Petition

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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EDGEWOOD SCHOOL DISTRICT and
TURTLE CREEK AREA SCHOOL DISTRICT,
Petitioners,

vs.

DOROTHY HOOTS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Petitioners are two local school districts in Pennsylvania which have been abolished by a federal judge in ordering a multidistrict remedy in a school desegregatation case brought by private parties. Neither petitioner was made a party to the litigation before the court found a violation. Nor have petitioners ever been accorded a hearing on that issue since their participation by intervention has been limited to questions of relief.

Over petitioners' objection, the federal judge has merged the two petitioner school districts and three other local school districts into a single new district, operating under the continuing supervision of the court and created to maximize the desegregation of public schools in the face of segregated residential housing patterns.

This case presents three interrelated issues:

1. May school districts be abolished by a federal court as part of a multidistrict desegregation remedy without first permitting the local districts to contest the issue of whether plaintiffs' rights were violated?

2. In fashioning a school desegregation remedy, may a federal court require the consolidation of several local districts into one and oversee the administration of the new district in order to maximize racial integration, without first holding a hearing and deciding that those local districts would have been thus consolidated and administered but for the violation?

3. May the required "intent to discriminate" in a school desegregation case be found by:

   (a) inferring that intent from evidence that, although revised local school boundaries actually lessened segregation, they foreseeably did not maximize desegregation;

(b) shifting the burden of proof to the defendants to disprove such intent by demonstrating that the school boundaries were revised for *bona fide* educational reasons; and

(c) not permitting the local school districts to offer evidence of those reasons or otherwise to contest the issue of violation?

PARTIES TO THE PROCEEDINGS

In addition to petitioners, appellants below were the Churchill Area School District, the Swissvale Area School District, the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education and its Chairman, W. Deming Lewis, the Allegheny County Board of School Districts, the Allegheny Intermediate Unit Board of School Directors, and their President, Edward X. Hallenberg.

Appellees below were Dorothy Hoots, individually and as mother of her children, Janelle Hoots and Jamie Hoots; Mrs. Addrallace Knight, individually and as mother and natural guardian of her children Ronald Knight, Loretta Knight, Terrance Knight, Marc Knight and Byron Knight; Barbara Smith, individually and as mother and natural guardian of her children Twanda Smith, Tevela Smith, Joseph Smith, Wesley Smith and Eric Smith; on behalf of themselves and all others similarly situated; Mae Helen Woody, Juanita Jordan and the General Braddock Area School District.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Edgewood School District and Turtle Creek Area School District respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered on February 1, 1982.

OPINIONS BELOW

The opinion of the Third Circuit affirming the district court in all respects is reported at *Hoots* v. *Commonwealth of Pennsylvania*, 672 F.2d 1107 (1982). The district court's opinion finding a constitutional violation is reported at *Hoots* v. *Commonwealth of Pennsylvania*, 359 F. Supp. 807 (W.D. Pa. 1973); one of its two opinions on the relief ordered is reported at 510 F. Supp. 615 (W.D.Pa. 1981). The other is unpublished.

These three decisions are reproduced in a separate appendix filed jointly with the Swissvale school district, a separate petitioner. The joint appendix is cited herein as "App."

JURISDICTION

The Court has jurisdiction to review the final judgment of the Third Circuit, which was issued and entered on February 1, 1982, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No federal statute or regulation is involved. State school consolidation statutes, to the extent relevant, are quoted in the opinions below. The questions presented for review do not require the Court to construe state statutes or to decide questions of state law.

STATEMENT OF THE CASE

A class of parents residing in three Pennsylvania boroughs filed suit in 1971 alleging that the scheduled consolidation into a new single school district of the public school systems serving those boroughs violated the parents' Fourteenth Amendment rights by causing their children to attend racially segregated schools.[1] The defendants were the Commonwealth of Pennsylvania, the State and Allegheny County Boards of Education, and several of the Board's officers. No local school district or its governing board was named a party.

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[1] The jurisdiction of the district court was based upon 28 U.S.C. §§ 1331(a), 1343(a)(3) and (4).

Prior to the creation of the new consolidated district, in 1971, there were 46 local school districts in Allegheny County. The complaint did not allege that any local school district participated in the alleged violation. And, the relief sought did not propose altering other local school district boundaries.

For reasons not explained in the record, the Commonwealth chose not to defend the lawsuit. Before trial, it moved to join absent local school districts as necessary parties. The motion informed the court that the Commonwealth's interests in the lawsuit conflicted with those of the local districts and that the Commonwealth would not properly protect their interests. The joinder motion was denied.

The case was tried to the court without the participation of any local school district. Plaintiffs' case lasted only two days and centered on expert testimony. Defendants offered no defense, tendered no witness, and simply submitted two documents showing the levels of state financial assistance to the new consolidated school district and other local districts.

In May 1973, the court issued its opinion finding for the plaintiffs on the issue of violation and setting forth its reasons for denying the Commonwealth's motion to join the local school districts. 359 F. Supp. 807, 821-823, App. 23-26c. The court held that complete relief could be granted without joinder of the local districts because, in the court's view, "surrounding school districts have no legal right to have their existing boundaries maintained and consequently they have no legal interest . . . which can be affected by the outcome of this litigation." *Id.* at 821, App. 23c. The court merely allowed the adjoining districts to be heard in developing a plan of desegregation. Later, petitioners and other local school districts were permitted to intervene solely on the prospective issues of relief and were not permitted to contest the issue of violation. Rec. App. II 996a. [2]

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[2] All references to the record are cited to the appendix filed with the third circuit and are hereafter referred to as Rec. App. ___ .

Many proposed plans of school reorganization were rejected by the court during the next several years. Eventually, in 1981, the district court adopted a plan ordering the abolition of five local school districts — Edgewood, Turtle Creek, Swissvale, Churchill and General Braddock — and their merger into a single new district, called Woodland Hills. 510 F. Supp. 615, App. D, and App. E. Following the entry of that order, timely appeals were taken by four of the five school districts, including petitioners. The court of appeals affirmed the final judgment on February 1, 1982.

Below are summarized the findings of the district court regarding the 1971 Pennsylvania school consolidations, the nature of the constitutional violation found, and the scope and purpose of the relief ultimately ordered.

1971 Pennsylvania School Consolidations.

Between 1961 and 1968, the Commonwealth enacted three successive statutes providing for the consolidation of local school districts (Acts 561, 299, and 150*).[3] The General Braddock district was created pursuant to Act 150 on July 1, 1971, by consolidating the previously separate systems serving the boroughs of Braddock, North Braddock, and Rankin. 359 F.Supp. 813, App. 6c. The effect of this consolidation was to reduce *de facto* segregation resulting from residential patterns. By joining Braddock (80% nonwhite enrollment) and Rankin

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[3] Act 561, 24 Pa. Cons. Stat. §§ 2-281 *et seq.* (1961); Act 299, 24 Pa. Cons. Stat. §§ 2-290 *et seq.* (1963); and Act 150, 24 Pa. Cons. Stat. §§ 2400.1 *et seq.* (1968). Acts 299 and 150 specified that consolidations be evaluated against such racially neutral criteria as:

> topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education.

359 F.Supp. at 812, App. 4c.

(57% nonwhite enrollment) with North Braddock, the new General Braddock district had a nonwhite enrollment of 44.5%. *Id.* at 814, App. 9c.

The consolidations in 1971 left unaffected the boundaries of Edgewood and Churchill. The Turtle Creek district was enlarged by the consolidation of a previously all white district (Turtle Creek) with an adjacent district (East Pittsburgh) that in 1967 had a 6% nonwhite student population. *Id.* at 813 and 819, App. 6c and 13c. A larger Swissvale district was also created in 1971 by merging Swissvale (which had nearly a 10% nonwhite student enrollment in 1967) with the Braddock Hills district which had a substantial nonwhite population.[4] *Id.*

The consolidation of Turtle Creek in 1971 under Act 150 was based on a plan developed and approved under the prior Act 299. The State Board had heard evidence and made findings that combining the East Pittsburgh district with Turtle Creek would avoid "prohibitive transportation conditions" and "excessive" transportation of pupils. This decision was affirmed by a Pennsylvania state court.[5]

The decision to allow Edgewood to remain unchanged was based on its demonstration to the State Board that Edgewood was amply meeting the educational needs of its pupils. Consolidation was therefore unnecessary to fulfill state educational objectives which were already being well met. This decision was appealed. The Pennsylvania Supreme Court affirmed the

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[4] As of 1970, Braddock Hills had a higher black population percentage than North Braddock. 359 F.Supp. at 816, App. 13c. Yet, Braddock Hills was merged with a district with a higher white population (Swissvale) and not with Braddock or Rankin which had the highest percentages of black residents. Thus, the 1971 consolidation of General Braddock did not result in the most heavily concentrated nonwhite school district possible.

[5] These materials were added to the record in the court of appeals as Appendix A to the brief of appellant petitioners, and judicial notice of them was requested.

State Board's findings as "amply supported by substantial evidence":

> Although Edgewood has a pupil population below the desired minimum, it is amply meeting the educational needs of its pupils. The fact that approximately 85% of its graduating classes go on to degree granting institutions bespeaks the type of pupil which it enrolls and the adequacy of its educational program. Despite the small percentage of students that do not continue into higher education, Edgewood provides a wide variety of business and vocational courses to adequately serve all of its students. Edgewood has the financial base to continue this fine educational program for the special needs of its pupils.

Edgewood Borough School District Appeal, 445 Pa. 343, 285 A.2d 880, 884 (1971). That court held the State Board had "scrupulously fulfilled its statutory mandate to 'approve such plans as it deems wise in the best interests of the Commonwealth.' " *Id.*

The three districts which were merged into the new General Braddock district appealed their consolidation to the state courts. Each expressed a desire to remain separate — as an alternative, only Rankin sought to be included in the Swissvale district. Their appeals were unsuccessful, and the merger of two predominantly black districts with a predominantly white district was upheld.

Nature Of The Violation.

Despite the fact that the new General Braddock district actually reduced the concentration of nonwhite students in two of the three merged systems, the district court found that creation of General Braddock had a segregative effect and that such a consequence was reasonably foreseeable in 1971 when the new district was created. The district court findings were issued before the decision in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), and no express finding of "segregative purpose or intent" was made by the district court.

The court cited residential housing patterns as the cause of racial imbalance between the local school districts. The court observed that 'pervasive racial discrimination which restricts housing opportunities of blacks . . . is a factor which accounts for the concentration of blacks within Braddock, North Braddock, and Rankin." 359 F. Supp. at 816, App. 13c. There was no evidence or finding that any defendant or local school district was responsible for the division of residential housing along racial lines.

The court also expressed its concern over a "white exodus" from some boroughs. The testimony of a single expert witness was relied upon for a finding that the white populations of Braddock and Rankin had been moving elsewhere, and that it was "extremely likely" that "Braddock and Rankin [would] become 100% black or nearly so and North Braddock [would] develop the same characteristics unless remedial action [was] taken as to the General Braddock Area School District because of the relationship of school population to residential neighborhood stability." *Id.* at 815, App. 11c.

The court found that there were three or more alternative school consolidations which could have resulted in a rearrangement of local school districts with a lower nonwhite percentage than that achieved by the General Braddock consolidation. The court further found that unspecified school districts in the vicinity of Braddock and Rankin sought to avoid being included in a school district with those two districts because of the high concentration of blacks in them.[6] *Id.* at 816-817, App. 14c.

The district court found that the State and County Boards "knew or should have known" that the new General Braddock

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[6] The district court cited *no* evidence that either the State or County Boards gave credence or weight to such "desires" of local municipalities. The local districts were never accorded a hearing on the issue of what their motivations and desires actually were.

district, with a 44% nonwhite population, was a racially segregated school district and that they refused to give consideration to the foreseeable and avoidable adverse educational and racial effects resulting from the concentration of black children and children from poor, educationally-deprived homes in a single school district. The court found that creation of General Braddock "maximized" racial segregation with public schools since no other combination of school districts within the relevant portion of Allegheny County would have created a school district of at least 4,000 pupils with as large a percentage of nonwhite enrollment[7] *Id.* at 818-819, App. 18c-19c.

The court further found that the standards for school reorganization, as well as recognized educational standards testified to by plaintiffs' experts were not met by the creation of General Braddock. *Id.* at 819, App. 19c. Although General Braddock satisfied the "desired minimum" in size, other school districts which were created or left unchanged did not. The court also accepted the testimony of plaintiffs' experts that, because of the low income of residents in the General Braddock area, "a comprehensive program of education" could not be provided. *Id.* at 820, App. 20c. The court additionally found the standards were ignored because any action maintaining racial segregation was against the public interest and because the new districts did not result, in the court's view, in "the maximum utilization of existing buildings." *Id.*, App. 20c-21c.

Based on these findings the court entered ultimate findings that the natural and foreseeable effect of combining Braddock, North Braddock, and Rankin into one school district was to

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[7] Acts 299 and 150 provided that a proposed school district should have a population of at least 4,000 unless the other criteria warranted a smaller district. The Pennsylvania Supreme Court described the 4,000 level as a "desired minimum" and not mandatory. *Edgewood Borough School District Appeal*, 285 A.2d at 884.

maximize racial segregation since the single district was "built on a pattern of residential segregation." *Id.* at 821, App. 22c. The court found that there was no explanation offered for the creation of General Braddock district and no evidence in the record that the plans of consolidation, as adopted, were rationally related to any legitimate purpose. *Id.* It concluded, therefore, that the creation of General Braddock by the County and State Boards was done "to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin" because of their high concentration of blacks. Thus, the court found "race was a factor, *at least indirectly*, in the formation of [General Braddock]" (emphasis supplied). *Id.*, App. 21c-22c.

In its conclusions of law, the court held that school authorities are accountable for the foreseeable consequences of their policies, and that where racially identifiable schools result from such policies, the school authorities bear the burden of showing that the policies are based on educationally required, non-racial considerations. *Id.* at 823, App. 25c.

The court further concluded that the County and State Boards violated the Fourteenth Amendment by selecting school district boundaries which conformed to and built upon patterns of racial segregation. *Id.* The court held that when the foreseeable consequences of actions taken by school authorities are to preserve segregation, such actions violate the Constitution. *Id.*, App. 26c. The court further held that the creation of General Braddock had the foreseeable effect of maximizing segregation and thus constituted *de jure* discrimination. *Id.* The court declared that when the state seeks change, it must proceed in a fashion that will lessen previously existing school segregation. *Id.* The refusal of the State and County Boards to consider racial criteria constituted a specific racial classification in the court's judgment which could not be upheld unless "absolutely necessary to

the accomplishment of a permissible State Policy." *Id.*, App. 27c.

Nature Of The Relief.

The court's order of May 15, 1973, gave the defendants 45 days to submit a comprehensive plan that would achieve the greatest possible degree of desegregation. *Id.* at 824-825, App. 28c-29c. The order provided that the plan should alter the boundary lines of General Braddock, and as appropriate of nearby school districts. The court provided that each school district whose boundaries might be altered would be given the opportunity to be heard prior to the adoption of a final plan. *Id.* at 824, App. 29c.

No comprehensive plan was submitted within 45 days. Six plans were submitted over the next several years, four of which involved consolidation of some or all of the school districts involved in this case into one or more new ones. The other two plans were a "tuition plan" for voluntary transfer of pupils and an "upgrade plan" to increase the educational depth of the program offered by General Braddock. Numerous interlocutory appeals also were taken prior to January 26, 1981, when the third circuit directed that an acceptable remedial plan be in place by the fall of 1981. *Hoots* v. *Commmonwealth of Pennsylvania*, 639 F.2d 972 (3d Cir. 1981).

On March 5, 1981, the district court concluded that the violation involved several of the school districts, including the four districts added to the General Braddock district. 510 F. Supp. 615, App. D. The court held no additional evidentiary hearing. Instead, it reiterated its May 1973 findings. The court held that General Braddock "was created as a result of an interdistrict violation" and that an interdistrict remedy would be appropriate. *Id.* at 619, App. 7d. This result obtained, the court declared, whether or not the local school districts were participants in the violation. *Id.* at 619-21, App. 8d-10d.

On April 20, 1981, the court began a three-day hearing which was "strictly limited" to the question of geographic boundaries of the proposed district and the identity of the districts to be included. App. 3e. On April 28, the court created the new Woodland Hills district by adding Turtle Creek, Edgewood, Swissvale, and Churchill to General Braddock. The court selected these districts based on factors such as geographic location, transportation, size, financial resources, and racial composition. App. 6e-8e. This plan was declared to achieve the "highest beneficial results" of any plan submitted. App. 4e.

The court ordered on April 28 that the five districts "shall cease to exist" and established an Interim Operating Committee to assume governance of the new district. The court directed the Committee to develop a plan for desegregation of comprehensive breadth:

> (14) The plan of desegregation shall be designed and implemented in such a manner as to achieve and satisfy the greatest possible degree of actual desegregation, including desegregation of student enrollment, attendance, administration, faculty, staff, facilities, programs and activities. The plan shall be equitable in every respect and designed to achieve an equal sharing of the burden of desegregation between black and white students, parents and communities. The plan shall be designed not only to eliminate the effects of past discrimination but to the greatest extent possible, to prevent like discrimination in the future years.

App. 12e.[8] Since then, the district court has continued its supervision of the new Woodland Hills district by directing the transportation and assignment of pupils, school closings, the provision of athletic teams, and other detailed matters of school administration.

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[8] Appeals were taken from the final judgment entered on April 28, 1981. The district court's opinions and judgment on both the issue of violation and the multidistrict remedy were affirmed by the third circuit on February 1, 1982. App. A. and B.

REASONS FOR GRANTING THE WRIT

The Court is requested to decide whether in school desegregation cases, local school districts may be abolished as part of a multidistrict remedy without being accorded minimal due process to contest the issue of violation, as well as that of remedy. This issue, which was raised but not decided in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), is an important one on which the Court should give guidance to the federal judiciary.

Review is also warranted because the decisions below conflict with the Court's holdings in *Milliken* and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Those cases hold that the remedy in school desegregation cases should be tailored to put the plaintiffs in the situation which would have occurred in the absence of the violation. The relief sought below constitutes a clear abuse of federal judicial power in this sensitive area of the law. The district court has gone far beyond the violation found and has ordered comprehensive consolidation and administration of school districts in order to maximize desegregation irrespective of what would have occurred absent a violation.

Certiorari should also be granted because the district court found a violation of the Fourteenth Amendment based on the foreseeability of "segregative effects." Such a finding is improper as a matter of law and plain error under *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979). Moreover, the court below shifted the burden of proof to the defendants, contrary to the holding in *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979), and required them to prove the *bona fide* non-racial reasons for their actions. However, the court refused even to hear evidence from the local district on that issue.

This case therefore presents important questions under the Fourteenth and Fifth Amendments, regarding the role and

rights of local school districts in the trial of school desegregation cases and the formulation of remedies in them.

I. THE COURT SHOULD RESOLVE THE QUESTION OF WHETHER LOCAL SCHOOL DISTRICTS SHOULD BE HEARD ON THE ISSUE OF VIOLATION BEFORE THEY MAY BE ABOLISHED AS PART OF A MULTIDISTRICT DESEGREGATION REMEDY.

In *Milliken* v. *Bradley*, 418 U.S. 717, 741-42 (1974), the Court recognized the importance of local control over public schools[9] and admonished the federal courts not casually to ignore school district boundaries as a "mere administrative convenience." Because *Milliken* was held not to involve an interdistrict violation, the court did not reach the important issue of whether local school districts were entitled, as a matter of due process, to an "adequate opportunity to present evidence that they had committed no acts having a segregative effect." *Id.* at 752.

This case presents the issue left unresolved in *Milliken*. School boundaries may be changed only after there has been a finding of constitutional violation and, even then, only to the extent necessary to remedy the violation. Here, the local school districts were not joined as parties until after a violation was found, and their intervention was limited solely to the question of relief. At no point have the local districts here been accorded any opportunity to be heard on any facet of the issue of violation. Nonetheless, they have been made subject to an order not merely adjusting their boundaries, but abolishing them entirely and placing their facilities, operations, and students in a new district supervised closely by a federal judge.

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[9] The Court declared: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools." *Milliken*, 418 U.S. at 742. *See also Hills* v. *Gautreaux*, 425 U.S. 284, 293-96, 298-99 n.13 & 14 (1976).

Judicial abolition of local school districts mandates that due process first be accorded to them. Although they may be creatures of the state, they are recognized entities which are given due process rights and representational rights under federal and state law. Both liberty and property are affected when a school district and its board are extinguished and the operations, facilities, and pupils are assigned to another governing body. Thus, the school districts here were entitled minimally to reasonable notice and an opportunity for a hearing appropriate to the case. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The complaint in this case did not name either petitioner, nor did it demand a change in their boundaries. It definitely did not hint that either district would be abolished. Indeed, in denying the Commonwealth's Rule 19 motion regarding absent local school districts, the judge expressly noted: ". . . we don't consider it to be . . . this Federal Court's problem to indulge in the business of creating the districts or defining the boundaries, because there is a state machinery for doing that." Rec. App. I 54a.

Even if the plaintiffs or the court had contemplated terminating other school districts or materially altering their boundaries, the district court clearly regarded the school districts as having no protectable interest which entitled them to minimal due process. The court held that because higher authorities in the state might ultimately control their boundaries, local school districts were not necessary parties to an adjudication of violation in a multidistrict remedy case:

> The surrounding school districts have no legal right to have their existing boundaries maintained and consequently they have no legal interest under the provisions of Fed.R.Civ.P. 19 which can be affected by the outcome of this litigation.

359 F. Supp. at 821, App. 23c. The district court's holding, summarily affirmed in this respect by the third circuit, *Hoots* v. *Pennsylvania*, 495 F.2d 1095 (3d Cir. 1974), conflicts with the requirements of due process and presents the important constitutional question left unresolved by *Milliken*.

The eventual joinder of the local districts solely at the remedy stage was too late to satisfy due process since the determination of the violation should control the scope and notice of the remedy. "A fundamental requirement of due process is 'the opportunity to be heard'. . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[10] *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Petitioners have never been heard on any aspect of the issue of violation in this case.

The need to assure that local districts are heard on the issue of violation is underscored by the circumstances of this case. First, the interests of the local school districts were not defended since the Commonwealth chose not to present evidence. Second, the bases of the district court's decision emphasized the need to hear from the local districts. The finding of violation rested on the foreseeability of segregative effect and the *absence* of any proffered *bona fide* educational reasons justifying the 1971 consolidation decisions. From these circumstances, the court

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[10] The court of appeals has suggested that a letter from one defendant to the local school districts advising them of the Commonwealth's view that relief, if granted, might result in a change of boundaries satisfied the requirements of due process. *Hoots* v. *Commonwealth of Pennsylvania*, 495 F.2d 1095, 1097 (3d Cir. 1974). However, the complaint and state of the record as of the first day of trial prompted the district court to observe that any change of boundaries was a matter for the state, not a federal court. Certainly, at no time prior to the liability trial was it proposed that any existing district be abolished. It is the obligation of plaintiffs to bring in as defendants those parties against whom relief may be sought; it is not the obligation of an unsued person voluntarily to make itself a party to a lawsuit to prevent unrequested relief from being later granted.

inferred that the State and County Boards were acceding to the "sentiments" of the local municipalities not to be included in a district with Braddock or Rankin and, hence, that race was "at least indirectly" a causative factor. Yet, the district court never heard from the districts themselves regarding the substantial reasons, documented in State Board and state judicial proceedings, supporting the *bona fides* of the 1971 consolidation decisions.[11] The evidentiary void on which the court relied to find a violation was a direct function of its failure to give the local districts a hearing on that issue.

The Court should grant certiorari to decide whether and under what circumstances local school districts must be heard on the issue of violation before their boundaries are materially altered or their separate existence ended by judicial order.

II. THE SCOPE OF THE REMEDY GREATLY EXCEEDS THE NATURE OF VIOLATION AND IS IN CONFLICT WITH THE COURT'S HOLDINGS IN *SWANN* AND *MILLIKEN*.

Having found a violation, the district court held that the remedy must be a "plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation." 359 F. Supp at 824, App. 28c. The Supreme Court has never mandated that the remedy in school desegregation cases must be a plan to produce the greatest possible degree of actual school desegregation. To the contrary, the Court in such cases has endorsed the recog-

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[11] The State Board found that the combination of Turtle Creek and East Pittsburgh would result in easing severe traffic congestion, would eliminate the problem of the limited accessibility of other districts to Turtle Creek and East Pittsburgh because of frequent flooding, and would lessen overall pupil transportation. *See* pp. 5-6 *supra*. The Pennsylvania Supreme Court found that Edgewood had a fine educational program which it was financially able to support and that the State Board was not bound to disturb such a fortunate situation. *Edgewood Borough School District Appeal*, 445 Pa. 343, 285 A.2d 880 (1971).

nized equitable doctrine that a "remedy is necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974).

The court below failed to follow the *Milliken* principle of restoring the plaintiffs to the position they would have occupied but for the violation. The court seized upon its finding of violation as an opportunity to remedy a host of perceived societal ills. Its findings make clear the court's intent to arrest "white flight" and to stabilize residential housing patterns by assuring, *first*, that no locale offered markedly superior services or facilities and, *second*, that students would be mixed by race throughout the wider geographic area. The court decided on the goal of maximum desegregation, which then shaped its local district reorganization, as well as the administration of the new Woodland Hills district.

As the court's April 28 order recites, the new district is being operated to achieve maximum racial balance and parity of services.[12] This has resulted in large scale reassignment and busing of pupils, closing of buildings, supervision of athletic and extracurricular programs — all pursuant to the ultimate review and approval of the district judge. Such detailed judicial supervision is rare even where dual systems have been maintained within a single district. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971) (as

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[12] The third circuit stated in an earlier case:

> A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. . . .
>
> The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects.

Evans v. *Buchanan*, 555 F.2d 373, 379-80 (3d Cir. 1977) (en banc).

with any equity case, the nature of the violation determines the scope of the remedy). No one can fairly claim that had the General Braddock district not been created in 1971, there would have been the extensive rearrangement of facilities, programs, and pupils insisted upon by the court as part of its "maximum desegregation" remedy.

In this case, the district court never conducted a hearing nor made any findings regarding the remedy necessary to restore plaintiffs to the situation which would have occurred absent a violation. In fact, the court itself observed in finding a violation that there were several possible alternative consolidations that might have been rationally adopted other than those actually decided on in 1971. It found that each of these alternatives would have been more consistent with state law and recognized educational standards. The court should have heard evidence as to which, if any, of the petitioners would have been combined with the General Braddock district but for the violation. Alternatively, the court should have mandated the defendants and the local districts to follow the state school consolidation statutes and to reformulate their plans in a nondisciminatory manner. By instead fashioning a new district to satisfy its own dictates and perceptions of preferred school organization, the district court gravely erred in failing to design a remedy to restore the plaintiffs "to the position they would have occupied in the absence of such conduct." *Milliken*, 418 U.S. at 746.

The Court should grant certiorari to review and decide the question of whether a court may abolish local school districts as part of a desegregation remedy without first (a) determining whether their abolition would have occurred but for the violation and (b) allowing the local school districts to be heard on the nature of the violation and what would have happened in the absence of such a violation.

III. THE DECISIONS BELOW CONFLICT WITH THE COURT'S HOLDINGS THAT "SEGREGATIVE INTENT" MAY NOT BE INFERRED SOLELY FROM FORESEEABLE SEGREGATIVE IMPACT.

The district court erroneously concluded that knowledge of the foreseeable segregative impact of official action was sufficient to constitute *de jure* discrimination in violation of the Fourteenth Amendment. 359 F. Supp. at 823, App. 26c. The delays in fashioning relief obscure the fact that the finding of violation actually occurred before this Court announced that proof of segregative intent was required under the Fourteenth Amendment and that such intent could not be inferred solely from the foreseeability of discriminatory impact. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979). Yet even as late as April 28, 1981, the district court explained its concept of the violation thus: The "intentional creation [of General Braddock] as a racially identifiable black school district constituted the constitutional violation found in this case." App. 6e-7e.

After concluding that the creation of a racially identifiable district was foreseeable, the court improperly shifted the burden of proof onto the defendants to disprove an inference of intent by showing the non-racial reasons for the 1971 school consolidation decisions. As the Court stated in *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 536 n.9 (1979):

> We have never held that as a general proposition the foreseeabilty of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants.

The court expressly adopted a rule that where the foreseeable consequences of actions by school authorities preserve or fail to

reduce existing *de facto* segregation, those local authorities "bear the burden" of showing their actions are based on educationally-required considerations. 359 F. Supp at 821, App. 22c. Although the shifting of the burden of proof itself was improper, the error was magnified by the court's failure to join the local school districts as parties or to permit them to contest the violation. Their absence precluded any opportunity to supply the court with the *bona fide* reasons supporting the 1971 school consolidations.

The court's inference of intent from foreseeable consequences not only conflicts with the *Dayton* case on the question of burden of proof, it erodes completely the ruling in *Keyes* and subsequent decisions that the requisite discriminatory intent may not be inferred from foreseeable discriminatory consequences. *See Washington* v. *Davis; Massachusetts* v. *Feeney; Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The court held that when the state seeks change in its public school system, "it must proceed in a fashion that will lessen previously existing school segregation." 359 F. Supp. at 823, App. 26c. The effect of these holdings is to require local school districts to lessen perceived racial imbalance regardless of its cause at all available opportunities upon penalty of otherwise having violated the Fourteenth Amendment.

The court of appeals acknowledged that the district court did not find "segregative purpose or intent" in those words, but concluded that the district court had sufficient evidence from which to infer intent. Essentially, the court of appeals relied upon hearsay statements not attributable to petitioners which were the apparent basis for the district court's conclusion that public sentiment in surrounding districts was opposed to con-

solidation with Braddock and Rankin because of their high concentration of blacks. [13]

The court of appeals completely ignored the fact that the district court based its finding that the State and County Boards acted to honor the sentiments of the local municipalities on its other findings that those Boards knew the consolidations would have a segregative impact and that the record offered no *bona fide* non-racial justification for them.

The Court should grant certiorari because the decisions below conflict with the holdings in *Keyes*, *Dayton*, and other precedents and apply both an erroneous standard and burden of proof in school desegregation cases.

---

[13] The first piece of evidence relied upon by the court of appeals, for example, is a letter from a Mrs. Ryland, a private citizen, who opposed inclusion of Turtle Creek with General Braddock, apparently on racial grounds. This single letter from a member of the public to a public body can hardly serve as proof of the basis on which the public body ultimately acts, particularly when there is no evidence that the letter was considered in the decisionmaking process or accorded any weight. The rest of plaintiffs' supporting evidence, cited on appeal to support discriminatory intent, is equally non-conclusive and vague.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Third Circuit.

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Dated: May 3, 1982

Joint Appendix

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Nos. 81-2030 and

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EDGEWOOD SCHOOL DISTRICT and
TURTLE CREEK AREA SCHOOL DISTRICT, *Petitioners*,

v.

DOROTHY HOOTS, *et al.*, *Respondents*.

SWISSVALE AREA SCHOOL DISTRICT, *Petitioner*,

v.

DOROTHY HOOTS, *et al.*, *Respondents*.

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1691, 81-1692, 81-1693, 81-1694, 81-1695, 81-1790, 81-1986, 81-1987 and 81-1988

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated; Mae Helen Woody, Juanita Jordan

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD X. HALLENBERG, President of the Allegheny County Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the PENNSYLVANIA STATE BOARD OF EDUCATION; MICHAEL SULLIVAN, President of the School District of the Borough of Braddock, THE SCHOOL DISTRICT OF THE BOROUGH OF BRADDOCK, ANDREW LISYAK, President of the School Board of the School District of the Borough of Rankin; THE SCHOOL DISTRICT OF THE BOROUGH OF RANKIN, LEO CAMPBELL, President of the School Board of the School District of the Borough of North Braddock; and THE SCHOOL DISTRICT OF THE BOROUGH OF NORTH BRADDOCK; THE ALLEGHENY INTERMEDI-

ATE UNIT BOARD OF SCHOOL DIRECTORS
and EDWARD X. HALLENBERG AS PRESIDENT
OF THE ALLEGHENY INTERMEDIATE BOARD
OF SCHOOL DIRECTORS

CHURCHILL AREA SCHOOL DISTRICT
EDGEWOOD SCHOOL DISTRICT
SWISSVALE AREA SCHOOL DISTRICT
TURTLE CREEK AREA SCHOOL DISTRICT

School District of Edgewood,
Appellant in 81-1691

School District of Churchill Area,
Appellant in 81-1692

School District of Swissvale Area,
Appellant in 81-1693

School District of Turtle Creek Area,
Appellant in 81-1694

Swissvale Area School District, Churchill Area
School District, Edgewood School District and
Turtle Creek Area School District,
Appellants in 81-1695

School Districts of Churchill Area, Edgewood,
Swissvale Area and Turtle Creek Area,
Appellants in 81-1790

Allegheny County Intermediate Unit and
Allegheny County School Board,
Appellants in 81-1986

Commonwealth of Pennsylvania, W. Deming Lewis,
Chairman of the Pennsylvania State Board
of Education and the Pennsylvania State Board
of Education,
Appellants in 81-1987

Edward Hallenberg,
Appellant in 81-1988

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 71-0538)

Argued December 18, 1981

Before: GIBBONS, HUNTER and GARTH, *Circuit Judges*

(Opinion filed February 1, 1982)

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OPINION OF THE COURT

HUNTER, *Circuit Judge.*

1. This decision is the ninth chapter in the history of this decade-old school desegregation case.[1] The plaintiff class consists of parents of children who attend public schools in the General Braddock Area School District ("GBASD") in Allegheny County, Pennsylvania. Defendants are the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education (the "State Board"), the Allegheny Board of Education (the "County Board," later succeeded by the "Intermediate Unit"), and several of the Boards' officers. Plaintiffs filed a complaint on June 9, 1971, alleging that the consolidation of various school districts in Allegheny County by the Commonwealth of Pennsylvania, acting through the State

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1. The other decisions are: Hoots v. Commonwealth of Pennsylvania, 334 F. Supp. 820 (W.D. Pa. 1972) ("*Hoots I*"); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) ("*Hoots II*"); Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974) ("*Hoots III*"); Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) ("*Hoots IV*"); Hoots v. Commonwealth of Pennsylvania, 639 F.2d 972 (3d Cir. 1981) ("*Hoots V*"); Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981) ("*Hoots VI*"); Hoots v. Commonwealth of Pennsylvania, (W.D. Pa., 71-258, April 16, 1981) ("*Hoots VII*"); Hoots v. Commonwealth of Pennsylvania, (W.D. Pa., 71-258, April 28, 1981) ("*Hoots VIII*").

In addition, we have denied plaintiffs' applications for writ of mandamus on two occasions. Hoots v. Weber, No. 79-1474 (3d Cir. May 2, 1979); Hoots v. Weber, No. 80-2124 (3d Cir. Sept. 9, 1980).

and County Boards, had resulted in the creation of racially segregated schools. The district court, in *Hoots II*, held that the creation of GBASD by the State and County Boards was "an act of *de jure* discrimination in violation of the Fourteenth Amendment." *Hoots II*, 359 F. Supp. at 823. Various plans were considered by the district court as possible remedies for the continuing violations of plaintiffs' constitutional rights. In March 1981, the court decided which of numerous school districts could be included in any multidistrict remedy under the guidelines of *Milliken v. Bradley*, 418 U.S. 717 (1974). *Hoots VI*, 510 F. Supp. at 619. In April 1981, the district court approved the consolidation plan presently under appeal.[2]

2. Defendants' present appeal is based on two contentions. First, they argue that *Hoots II*, in which the district court found a constitutional violation, was incorrectly decided, in that the district court did not find *intentional* or *purposeful* segregative acts on the part of state officials. Second, defendants contend that the district court erred in fashioning the multidistrict remedy that it ultimately chose.

3. We find defendants' arguments unpersuasive and we affirm the rulings of the district court.

I. FACTS AND PROCEDURAL HISTORY

4. The facts of this case, especially those which lead to the initial filing of the complaint in this action, are ably and extensively set forth in the district court's May 1973 opinion. *See Hoots II*, 359 F. Supp. 807. The procedural posture of the case has been recited on numerous occasions by this court: *Hoots IV*, 587 F.2d 1340; *Hoots V*, 639 F.2d 972. Here, we will summarize

---

2. Applications for a stay of *Hoots VIII* have been denied by the district court, this court and the United States Supreme Court (June 29, 1981). *See* Appendix at 3180a, 3181a-3186a.

those accounts and then supplement them with a recital of subsequent events leading to the instant appeal.

5. During the 1960's, the Commonwealth of Pennsylvania on three occasions enacted legislation to reorganize the school districts in Pennsylvania's public school system. The Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S.§281 *et seq.* ("Act 561"), directed each county board of school directors to prepare a plan of organization of school districts for the county for review by the State Board of Education. This Act was superseded, although not substantively altered, by the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 *et seq.* ("Act 299"), and the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. §2400.1 *et seq.* ("Act 150"). Act 299 instructed the county boards to prepare on or before July 1, 1964 a plan of organization of school districts for the county and directed the State Board of Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise and in the best interest of the educational system of Pennsylvania.

6. Acts 299 and 150 provided for the plans of organization of school districts to conform to standards which were to be prepared by the State Board. In preparing these standards, the State Board was instructed to take into account: topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education. 24 P.S. §§2400.1, 2400.2; 24 P.S. §§2-291, 2-292. Both Acts also stipulated that no school district should, as a general rule, have a pupil population of fewer than 4,000 students.[3]

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3. Pursuant to these provisions, the State Board adopted Standards for Approval of Administrative Units. These standards provided, *inter alia*, that:

(a) An administrative unit shall make available an educational program and educational opportunities to meet the varying

7. The State and County Boards, pursuant to these statutes, established GBASD (63% black) on July 1,

NOTE — *(Continued)*

needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.

(b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

A letter from the Superintendent of the Department of Public Instruction advised the County Boards, including the Allegheny County Board, that the intent of the language of the last sentence of the above paragraph was to prevent *de jure* segregation through the fixing of school district boundaries and that the language was not to be construed to permit *de facto* segregation on the basis of race, religion or national origin which is by law prohibited.

(c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

(d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods.

(e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Hoots II, 359 F. Supp. at 812-13 (exhibit citations omitted). We note that the parties throughout their briefs and in oral argument have referred to the Standards as the "Section 7(c) issue." Paragraph 7(c) is identical to the verbatim quotation of paragraph 3(b) above. *See* Appendix 319a-20a.

1971, in the central eastern area of Allegheny County, east of Pittsburgh and north of the Monongahela River. The boards also created the predominately or all-white school districts of Turtle Creek (98.1% white), Swissvale (87.3% white), and Churchill (99.2% white), which border on GBASD, and the Edgewood School District (97.8% white), which is situated within approximately one mile of the GBASD. Appendix at 3233a. GBASD served the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. Braddock, North Braddock and Rankin are economically depressed, declining communities. The residents of these municipalities are poor and less educated than those of the other school districts in question. The recreational and shopping facilities within these communities have been rapidly declining and becoming increasingly older in average age. The boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. Finally, the populations of these three communities are becoming increasingly non-white at an accelerated pace. *Hoots II*, 359 F. Supp. at 814 (Findings of Facts 20-27).

8. Plaintiffs filed this action on June 9 1971. In December 1971, the district court denied defendants' motion to dismiss the complaint for failure to state a cause of action, concluding that "allegations of deliberate creation of racially segregated school districts state a cause of action." *Hoots I*, 334 F. Supp. 820, 822.

9. The district court also rejected motions by defendants seeking to join involuntarily as defendants the five school districts discussed in the complaint. However, the court stated that it would permit the school districts to intervene voluntarily in the action if they so desired. *Hoots I*, 334 F. Supp. at 823. The school districts did not do so. After the district court "instructed [the Commonwealth] to give notice" of the suit to those school districts, and after the Attorney General of Pennsylvania

wrote the five districts urging them "to intervene in this action immediately," the districts informed the court that they had "no interest in being" in the lawsuit, and were "deliberately not intervening." *See Hoots II*, 359 F. Supp. at 821; *Hoots III*, 495 F.2d at 1097; Appendix at 56a-61a, 614a-618a, 2712a, 3383a, 3389a.

10. On May 15, 1973, the district court held that the State and County Boards' creation of the identifiably black GBASD and the identifiably white Churchill, Edgewood, Swissvale and Turtle Creek districts "constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment." *Hoots II*, 359 F. Supp. at 823. The court ordered the defendants to submit promptly a desegregation plan, to take effect as early as possible, to achieve the greatest possible degree of desegregation within the public schools of the central eastern area of Allegheny County. *Hoots II*, 359 F. Supp. at 824-25. Specifically, the court ordered defendants to "prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation" which "shall alter the boundary lines of the General Braddock Area School District and as appropriate of adjacent and/or nearby school districts." *Id.* at 824. Defendants did not appeal.

11. In April 1974, after the district court's violation finding in *Hoots II*, Churchill, Edgewood, Swissvale and Turtle Creek petitioned to intervene. The district court granted these petitions insofar as they sought prospective intervention, but denied them insofar as they sought retroactive intervention. Churchill and Turtle Creek appealed this partial denial of their motions. We affirmed the district court, holding that the retroactive intervention petitions were untimely. *See Hoots III*, 495 F.2d 1095, 1097 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

12. The defendants did not submit a comprehensive plan of school desegregation within 45 days. In the following years, after granting defendants numerous extensions of time within which to develop effective deseg-

regation plans, the district court found it necessary to reject as inadequate six plans[4] submitted by the Commonwealth and the defendant districts. Five of the plans were interdistrict in nature, and four involved the consolidation of some or all of the school districts presently involved in this case into one or more new school districts. *See Hoots IV*, 587 F.2d at 1344-46; *Hoots V*, 639 F.2d at 975-77; *id.* at 984-86 (Higginbotham, J., concurring).

13. Plaintiffs appealed twice during the 1973-1980 period. On both occasions they asked this court for a remedial order ending school segregation in central eastern Allegheny County. We dismissed plaintiffs' first appeal in 1978 but we expressed "confiden[ce] that . . . an appropriate final order" would "be entered by year end" 1978. *Hoots IV*, 587 F.2d at 1351. In August 1980, after the district court denied plaintiffs' motion for injunctive relief for the second school year since 1978, plaintiffs appealed again. On January 26, 1981, we stated:

> We believe it to be essential that the district court afford relief to [plaintiffs] that will be effective in the fall of 1981. *Under no circumstances should a new school year begin in the fall of 1981 without an acceptable remedial plan in place.*
>
> Accordingly, we order the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:
>
> 1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;

---

4. Plans 22W, A, B and Z, the Tuition Plan and the Upgrade Plan.

2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and

3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981.

Hoots V, 639 F.2d at 980-81 (footnotes omitted) (emphasis added).

14. On March 5, 1981, the district court entered an opinion and order reaffirming its 1973 interdistrict violation finding. It concluded that the violation involved seven central eastern area school districts (including the five districts involved in this appeal), and determined that a multidistrict remedy involving some or all of those districts was appropriate. *Hoots VI*, 510 F. Supp. at 619.

15. On April 6, 1981, the district court rejected two remedial plans filed by defendants — the Upgrade Plan and the Tuition Plan — because neither could "achieve effective desegregation." *Hoots VII* at 2, 4; Appendix at 1379a, 1381a. The court concluded that "only an interdistrict remedy is feasible here, and . . . that only a single new district be formed from the consolidation because of the many difficulties presented by plans of consolidation into multiple new districts on which we have heard testimony in prior hearings." *Hoots VII* at 3; Appendix at 1380a. Accordingly, the court ordered hearings on the remedy to be held on April 20, 1981, "solely for the purpose of remedying the constitutional violations found to have been imposed on the plaintiffs here." *Hoots VII* at 4; Appendix at 1381a.

16. On April 28, 1981, the district court entered its first remedial order. *Hoots VIII;* Appendix at 883a. The court found:

> that a New School District composed of the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation of the General Braddock Area School District and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation.

Hoots VIII at 6; Appendix at 889a. The court accordingly ordered

> "[t]he Secretary of the Pennsylvania Department of Public Instruction, or his designate, and the Allegheny County Intermediate Unit [to] meet with the Interim Operating Committee of the New School District on or before the 15th day of June, 1981, to design a plan of desegregation and provide for its implementation with the beginning of the 1981-82 school year, and [to] continue such planning until such plan is fully operational within the New School District."

Hoots VIII at 17; Appendix at 900a.

17. After further hearings, the district court entered two orders on July 23 and August 13, 1981, setting forth the details of a plan of desegregation of the New District. That plan was implemented on September 8, 1981. After more than a decade since the filing of the complaint, a remedy for the violation of plaintiffs' constitutional rights was granted them.[5]

II. DISCUSSION

18. Defendants' present appeal is based on two grounds. First, defendants argue that the district court

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5. Two related appeals were consolidated with this one by order of this court on August 20, 1981. They are Hoots v. Commonwealth of Pennsylvania, Nos. 81-2298, 81-2787, 81-2788 and Hoots v. Commonwealth of Pennsylvania, No. 81-2732.

erred in holding that the defendants had violated the fourteenth amendment because, they argue, the district court found no intentional or purposeful segregation on the part of state officials. Second, defendants argue that the district court erred in fashioning a multidistrict remedy. We disagree.

A. *The Constitutional Violation Finding*

19. Defendants' argument regarding the district court's finding of intentional or purposeful segregation is twofold. First, they contend that the district court in *Hoots II* did not properly state a constitutional violation in terms of a "segregative purpose or intent" standard, as is required by the Supreme Court's decision in *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973). Second, even if the district court utilized the "purpose or intent" standard, defendants argue that there is no evidence on the record that would justify a constitutional violation finding.

1. *The Segregative Purpose or Intent Legal Standard*

20. It is not disputed that *Keyes* was the first Supreme Court decision to articulate the requirement of proof of segregative intent or purpose to establish a *prima facie* case of *de jure* school segregation in a northern state without a history of segregation statutes. 413 U.S. at 208. Although *Hoots II* was decided prior to *Keyes*, so that the district court could not possibly have tracked the language of that case, we find that the district court in *Hoots II* satisfied the requirement of proof of intentional or purposeful segregation.

21. The *Keyes* decision did not simply require proof of intent or purpose; it also held that the requisite intent or purpose can be established by inference, as well as by direct proof. 413 U.S. at 201, 208-09. The *Keyes* doctrines were amplified in *Village of Arlington Heights v.*

Metropolitan Housing Development Corp., 429 U.S. 252 (1977), where the Court explained that proof of segregative intent or purpose may be accomplished in various ways, and to varying degrees, and still satisfy the dictates of *Keyes*:

> [The requirement of] proof of racially discriminatory intent or purpose] does *not* require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such *circumstantial and direct evidence of intent as may be available*. The impact of the official action — whether it "bears more heavily on one race than another." *Washington v. Davis*, [426 U.S. 229,] 242 [(1976)] — may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . .

429 U.S. at 265-67 (emphasis added) (citation omitted).

22. Proof of segregative purpose or intent was again discussed in *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), where the Supreme Court re-explained the meaning of segregative intent in the context of school desegregation cases:

> [T]he District Court correctly noted that *actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate*

> *fact, forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn."* Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn."

443 U.S. at 464-65 (emphasis added) (citations omitted).

23. Bearing in mind that proof of segregative intent or purpose can be accomplished in a number of ways, we turn to an examination of the record. The first indication that the district court was using an appropriate constitutional standard was in *Hoots I*, in which it denied defendants' motion to dismiss plaintiffs' complaint for failure to state a cause of action. The court explicitly emphasized that plaintiffs' complaint contained allegations that "[i]n preparing and adopting the school reorganization plans defendants *intentionally and knowingly created racially segregated school districts. . . .*" *Hoots I*, 334 F. Supp. at 821-22 (emphasis added). From the very beginning of this lawsuit, then, it has been clear that the district court was couching the issues in terms of intentional segregation. And, in *Hoots II*, after full trial, the district court stated conclusions of law which demonstrate that the court was addressing questions of intent and purpose.[6] For example:

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6. Indeed, courts looked for intentional segregation in segregation cases well before *Keyes* required them to do so. *See, e.g.*, Sealy v. Department of Public Instruction, 252 F.2d 398, 901 (3d Cir. 1958). *Accord*, Swann v. Charlotte-Mecklenburg Board of Education, 401 U.S. 1, 17-18 (1971), expressly reaffirmed in *Keyes*, 413 U.S. at 208 & n.16, and cited in *Hoots II*, 359 F. Supp. at 823-24.

> A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were *based wholly or in part on considerations of the race of students* and which contributed to increasing racial segregation in the public schools.
>
> School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools *because of community sentiment or the wishes of a majority of voters.*

Hoots II, 359 F. Supp. at 822 (emphasis added) (citations omitted). This is the language of intention and purpose.

24. That the district court used the appropriate legal standard (*i.e.*, that the court was looking to segregative purpose or intent) in reaching its violation finding is established beyond cavil when we analyze certain factual conclusions by the district court. Some examples are:

(1) "Because the *State and County Boards in devising this plan* of organization of administrative units for the central eastern portion of Allegheny County *were influenced by* the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, *race was a factor*, at least indirectly, in the formation of the school district composed of Braddock, North Braddock, and Rankin." *Hoots II*, 359 F. Supp. at 821, reaffirmed in *Hoots VI*, 510 F. Supp. at 619 (emphasis added).

(2) "[T]he record contained no evidence showing that the school district boundaries established in the plan of organization of administrative

units are rationally related to any legitimate purpose and the court found that those boundaries did not promote any valid state interest." *Hoots VI*, 510 F. Supp. at 619, reaffirming *Hoots II*, 359 F. Supp. at 821, 822.[7]

(3) The court noted that "the history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150," revealed that the County Boards had acted over a period of years with the intention of guarding the white communities from Rankin, Braddock and North Braddock. *See Hoots VI*, 510 F. Supp. at 619, reaffirming *Hoots II*, 359 F. Supp. at 811-13, 816-17.

(4) "The natural, foreseeable and actual effect of [the Boards' decisions] was to perpetuate, exacerbate and maximize racial segregation within the public schools of the central eastern portion of Allegheny County." *Hoots II*, 359 F. Supp. at 821, reaffirmed in *Hoots VI*, 510 F. Supp. at 618.

We have on other occasions followed the Supreme Court's reasoning that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose." *Dayton Board of Education v. Brinkman II*, 443 U.S. 526, 536 n.9 (1979); *C.F. Richardson v. Pennsylvania Department of Health*, 561 F.2d 489, 492 (3d Cir. 1977), *citing Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights, supra*.

25. Finally, after having intent language in *Keyes* and *Milliken* brought to its attention, the district court

7. In *Columbus Board of Education, supra*, the Supreme Court stated that "a series of Board actions and practices that cannot reasonably be explained without reference to racial concerns" and that causes "racial separation in the schools" strongly evidences intentional discrimination. 443 U.S. 461-62.

explicitly reaffirmed its violation conclusion based on findings of purposeful official segregation. For example, in 1975, after the former districts filed motions to dismiss based on the alleged absence of "deliberate purposeful intent to segregate or invidiously discriminate or create a dual system . . . (as required by *Brown* through *Keyes* and *Milliken*)," the district court reopened the violation issue and permitted the districts to present testimony "by the State Board explaining actions [in the 1960's] that may have appeared to be racially motivated" but assertedly were not. Appendix at 2673a, 2799a. After hearing argument, the district court rejected appellants' contentions, based in part on State Board chairman Paul Christman's admission that Board members "knew they were heading into a segregation problem" in the central eastern area. Appendix at 2737a, 2762a. When counsel for Churchill School District argued that the district court "would have come to a different conclusion [in *Hoots II*] if [it] were making [its] order . . . after *Keyes*," Chief Judge Weber stated: "This is one place where you can say [you are] 100 percent wrong." Appendix at 2739a. The court then reaffirmed its earlier holding that the Board had "purposefully" segregated GBASD. Appendix at 2761a.

26. Furthermore, the court, in its November 11, 1979 Memorandum Order, indicated that the plaintiffs had established: that "segregative intent" had been demonstrated, Appendix at 3201a-3202a; that "racially discriminatory acts of the state have been a substantial cause of interdistrict segregation," *Hoots VI*, 510 F. Supp. at 619; that "district lines have been deliberately drawn on the basis of race," *id.* at 616, *quoting Milliken*; and that GBASD was "intentional[ly] creat[ed]as a racially identifiable school district," *Hoots VIII* at 9; Appendix at 892a.

27. In short, there is no question that the district court utilized the correct legal standard — intentional or purposeful segregation. Obviously, it could not, in *Hoots*

II, have cited the exact language of the forthcoming *Keyes* opinion. That does not mean, however, that *Hoots II* does not comply with the standards enunciated in *Keyes*, and we hold today that *Hoots II* did comply with those standards.

2. *The Factual Evidence of Segregative Purpose or Intent*

28. Having decided that the district court used the correct legal standard, we now turn to the question of whether the court's finding of intentional racial segregation, based on the evidence it cited, was clearly erroneous under Fed. R. Civ. P. 52(a).[8]

29. For an appellate court to find that a trial court's conclusion was clearly erroneous, the reviewing court must be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Supreme Court has also cautioned that adherence to this standard of review is particularly important in a desegregation case because of the trial court's "proximity to local [school] conditions." *Brown v. Board of Education II*, 349 U.S. 294, 299 (1955), and because the trial court's "[f]indings as to design, motive and intent . . . depend [so] peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949).

30. The heavy burden on a party attempting to overcome the clearly erroneous standard in a case of this nature was stated recently by Chief Justice Burger, concurring in *Columbus:*

> Like Mr. Justice Rehnquist, I have serious doubts as to how many of the post-1954 actions of the Co-

8. Rule 52(a) provides, in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

> lumbus Board of Education can properly be characterized as segregative in intent and effect. *On this record I might very well have concluded that few of them were. However, like Mr. Justice Stewart, I am prepared to defer to the trier of fact because I find it difficult to hold that the errors rise to the level of "clearly erroneous" under Rule* 52. The District Court did find facts sufficient to justify the conclusion reached by Mr. Justice Stewart that the school "district was not being operated in a racially neutral manner" and that the Board's actions affected "a meaningful portion" of the school system. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973).

443 at 468 (emphasis added).

31. In the briefs and in oral argument plaintiffs have explicated much of the direct and circumstantial evidence relied upon by the district court in reaching its violation determination. We will recite some of that evidence here. All of the following examples were cited and relied upon by Chief Judge Weber in *Hoots II*, 359 F. Supp. at 816-17:

(1) There was in evidence a letter to the County Board in 1964 from a Mrs. Ryland, a resident of Turtle Creek, requesting the Board to shield the white children of Turtle Creek from "colored people [of] the kind that live in North Braddock, Braddock, and Rankin." Appendix at 300a.

(2) There was in-court testimony by a central eastern area municipal official, Joseph D. Suley, admitting that he and his colleagues had pressured State and County Board members in the 1960's to insulate their municipalities (Braddock Hills, Turtle Creek and East Pittsburgh were mentioned by name) from merger with Braddock and Rankin because of "the black issue" and

because of the "bitterness" felt by "whites" towards "blacks" in the area. Appendix at 118a-126a.[9]

(3) There was in evidence a suggestion in a 1965 State Board Staff report that "the non-white population . . . factor" contributed to certain municipalities' "opposition" to proposals to merge all those districts with Braddock and Rankin. After noting Turtle Creek's and East Pittsburgh's objections to merger with Braddock and Rankin, and North Braddock's objections to merger with Turtle Creek, the staff report stated that "the non-white population is *not* a factor in opposition to *Turtle Creek since* the percent of *non-white* is as follows: Braddock 55%, Rankin 51%, Braddock Hills 10%, East Pittsburgh 20%, North Braddock 10%, *Turtle Creek none.*" (Emphasis added.) Appendix at 310a, 699a. The point is clearly that one of the *reasons* that Turtle Creek's inclusion in the merger was not objectionable was because it had no "non-whites." The implication is that a high non-white factor would be a reason against a district's inclusion.

(4) There was an admission under oath by State Board Chairman Dr. Paul Christman that he approved the isolation of Braddock, Rankin and North Braddock from all its neighbors in 1965 despite his recogn[ition] of "a black-white factor there that was improperly dealt with . . ." He noted that the situation could "become

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9. Defendants argue that Mrs. Ryland's letter should not have been admitted and that significant portions of Suley's testimony were hearsay. Our review of the record reveals no timely objections by the defendants, but does disclose that at the *end* of Suley's testimony, a motion to strike was made. Appendix 149a. The district court reserved ruling on the motion, but ultimately did not grant it.

On appeal, defendants argue that the district court erred in failing to grant the motion to strike, and that the district court was clearly erroneous insofar as it inferred segregative intent from Suley's testimony and Mrs. Ryland's letter. Assuming without deciding that the motion to strike was properly presented to the district court at least with respect to Suley's testimony, we find no merit to the defendants' argument.

even worse than it was at the time . . . in terms of [the] growth of percentage of blacks in those communities . . ." Appendix at 2702a-2703a.

(5) There was in evidence a statement in a 1964 brief by Braddock Hills officials to the County Board which attributed the Board's refusal to merge Churchill with any of its neighbors to political pressure from Churchill "based on politics, race, color, or creed . . ." Appendix at 588a.

(6) There was in evidence a letter to State and County Board members signed by Thomas A. Harper, a Braddock School Board member, and LaRue W. Frederick, the President of the area NAACP chapter, attributing neighboring municipalities' opposition to merger with Braddock and Rankin to fear of an "influx of a large number of Negro students into heretofore predominantly white units" and of the placement of "Negroes on the School Board [and in] professional and non-professional [staff positions] in the school system." Appendix at 592a-593a.

(7) There was in evidence a statement made by County Board President L.W. Early during hearings in 1968 on North Braddock's appeal that "we are painfully aware of [the fact] that . . . over the years the surrounding school districts had sought to avoid a school merger which would include Braddock and Rankin in their school district and that it looked like Braddock was going to be 'left holding the bag.' " Appendix at 701a.

(8) There was in evidence a statement by a County Board member "call[ing] attention to the fact that the socio-economic factors involved in Turtle Creek — East Pittsburgh make it a homogeneous unit." Appendix at 308a.

(9) Dr. John Finger, plaintiffs' educational expert, testified that, in his professional opinion, it was possible to "infer from some of the [public] documents that . . . race, indeed, was taken into consideration" by public officials "in recreating school districts," and that those offi-

cials "exclude[d] Rankin and North [Braddock] and Braddock from consolidation with neighboring white districts "because they are black." Appendix at 230a, 237a-38a.

32. In addition to specific pieces of direct evidence of segregative intent or purpose, we have already noted that the district court properly relied on circumstantial or "objective" evidence in *Hoots II*. *See* pp. 17-19 *supra*. The district court, for example, considered it significant that the Boards' redistricting plan disregarded statutory and administrative reorganization standards, *e.g.*, the statutory 4000 pupil minimum guideline, the requirement that existing facilities be used where possible, the requirement of racial and cultural diversity, and the requirement that each district be capable of providing a comprehensive educational program. *See Hoots II*, 359 F. Supp. at 819-20.

33. Furthermore, the district court properly weighed evidence such as the Board members' admitted knowledge that their redistricting decisions would cause and perpetuate segregation, the foreseeability of the segregative result, the Boards' formulation of boundaries that promoted no interest other than racial segregation, the Boards' rejection of alternative school district configurations in favor of a segregation-maximizing alternative, and the State Board's blatantly improper interpretation of its own "race regulation" to endorse the very evil the regulation was designed to prevent.[10] *Hoots II*, 351 F. Supp at 819-20.

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10. In carrying out the Reorganizations Acts, the State Board promulgated guidelines including one stating that "[r]ace . . . *shall not be [a] factor []* in determining administrative boundaries." *See* note 3 *supra*. In drawing the boundary lines in central eastern Allegheny County, State and County Board members admittedly applied a segregation "blind" interpretation of the guideline. That is, they pretended that they could be totally *oblivious* to race as a consideration — even if that meant that there would be greater segregative effects as a result of their actions. They adopted that stand despite their knowledge that such an interpretation conflicted with

34. Based upon this evidence, and upon the record as a whole, we find that the district court's constitutional violation finding was not clearly erroneous and, indeed, was fully supported by the record.

B. *The Multidistrict Remedy*

35. Defendants argue that the district court abused its discretion by consolidating the five school districts of Churchill, Edgewood, Swissvale, Turtle Creek, and GBASD into one desegregated district. We disagree.

36. We have noted before that "[i]n litigation as long and complex as this, the fashioning of relief should normally 'be entrusted in large measure to the sound discretion of the District Court Judge who has lived with [it] for so many years.' " *Hoots V*, 639 F.2d at 979, *quoting Gilmore v. City of Montgomery*, 417 U.S. 556, 577 (1977) (Marshall J., concurring). Furthermore, we said that

> [i]t is important to recognize that, as a reviewing court, we are not empowered to consider the matter *de novo*. The approval of a desegregation plan is committed to "the exercise of the district judge's discretion . . . [and] a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Board of Education*, 402 U.S. 1, 15-16. . . .

Evans v. Buchanan, 582 F.2d 760 (3d Cir. 1978) (further citations omitted).

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the State Human Relations Commission regulations and state policy and would result in the perpetuation and aggravation of pre-existing segregation in the central eastern area. *Hoots II*, 359 F. Supp. at 818-19. The district court concluded that the Boards' adoption of this blatantly unacceptable and counter-intuitive interpretation of the "race" guideline provided circumstantial proof that the Boards' otherwise-inexplicable choice of this interpretation was invidiously motivated. We agree.

37. The controlling standards for examining the propriety of an interdistrict remedy were laid down by the Supreme Court in *Milliken:*

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S. at 16. Before the boundaries of the separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially *discriminatory acts of the state or* local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus, an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, *or where district lines have been deliberately drawn on the basis of race.*

418 U.S. at 744-45 (emphasis added).[11]

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11. *Milliken* also requires that "a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts" be afforded to the school districts. 418 U.S. at 712-22 (footnote deleted). Here such a "meaningful opportunity" was afforded at all times. To the extent that the defendant school districts were precluded, after the district court's liability decision in 1973 in *Hoots II*, from arguing the question of whether there was intentional racial discrimination, we adhere to our earlier holding that the school districts' post-1973 intervention motions were untimely, *see Hoots III, supra*, 495 F.2d at 1097, and we reject the defendants' argument that the district court's decision should be reversed for failure to join necessary parties under Fed. R. Civ. P. 19.

38. In *Milliken* the Court held that a federal district court should not have ordered fifty-three suburban school districts to participate in the desegregation of the Detroit schools. The Court was concerned that the relief granted in that case was totally disproportionate to the "nature and extent of the constitutional violation." 418 U.S. at 744. Because the district court had received evidence of *de jure* segregated conditions in the Detroit schools, the Court reasoned that "[t]o approve the remedy ordered . . . would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy." 418 U.S. at 745.

39. In this case, unlike *Milliken*, the court tailored the relief granted to fit the actual showing of *de jure* discrimination by *all* of the districts involved. Indeed, the remedy fashioned by the district court here was narrowly drawn.[12]

40. The district court granted relief after finding that the State and County Boards intentionally created GBASD and its neighbors as identifiably black and white districts, and that this interdistrict violation conducted by the State occurred during the reorganization process in the 1960's and "included the redrawing of school boundaries in that part of [*i.e.*, central eastern] Allegheny County." *Hoots VI*, 510 F. Supp. at 619. Furthermore, the district court quite clearly found the constitutional violation to be "the manner in which the school district lines were drawn," including both the racially motivated refusal of County and State Boards to exercise their "expressly retained . . . power to force further merger" of GBASD's component municipalities with the surrounding white municipalities, and "the very elimination [of GBASD] from consideration for merger with [the predominately white] districts." *Id.* at 620-21.

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12. We believe it bears repeating that Chief Judge Weber has very ably dealt with all of the intricate, complex, and hotly contested issues in this case since 1971.

41. The court thus located and defined the *de jure* constitutional violation. Its explication of that violation was unambiguous. It proceeded to examine explicitly the dictates of *Milliken* and its progeny, and concluded that school districts in central eastern Allegheny County were created as part of the constitutional violation and that "[a] multidistrict remedy can be applied to [those] surrounding districts [whose] boundaries were drawn or redrawn during the course of the same violation which reacted the segregated school districts." *Id.* at 619.

42. Thus, it was rational for the court to conclude that an interdistrict remedy was appropriate in this case because it concluded that the violation itself was interdistrict in nature. That such a remedy is totally in harmony with *Milliken* is stressed by Justice Stewart in his concurrence in that case:

> This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, *that state officials had contributed to the separation of the races by drawing or redrawing school district lines*, see *Haney v. County Board of Education of Sevier County*, 429 F.2d 364; cf. *Wright v. Council of the City of Emporia*, 407 U.S. 451; *United States v. Scotland Neck Board of Education*, 407 U.S. 484; by transfer of school units between districts, *United States v. Texas*, 321 F. Supp. 1043, aff'd, 447 F.2d 441; *Turner v. Warren County Board of Education*, 313 F. Supp. 380; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for *restructuring of district lines might well be appropriate.*

418 U.S. at 755 (emphasis added). *See also, e.g., Evans v. Buchanan*, 416 F. Supp. 328, 340 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3d Cir. 1977) ("Where the State has

contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself."); *Penick v. Columbus Bd. of Ed.*, 429 F. Supp. 229, 266 (S.D. Ohio 1977), *aff'd*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979) ("Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter.").[13]

43. The district court having found a constitutional violation and having properly determined that an interdistrict remedy was appropriate because the violation was committed in the process of drawing school district lines, we believe that the burden of proof shifted to each defendant school district to establish that that district in particular was not involved in the violation. *See Keyes, supra*, 413 U.S. at 208-10 (burden of proof may be shifted to defendants in proper circumstances for reasons of fairness and policy); *Evans v. Buchanan*, 582 F.2d 750, 764-66 (3d Cir. 1978) (en banc) (where *de jure* segregation is established, and where placing burden on plaintiffs to show precise incremental segrega-

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13. The district court also properly held that the

State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> "Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, *and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.*"

Hoots VI, 510 F. Supp. at 620, *quoting* Evans V. Buchanan III, 416 F. Supp. at 340. In any event, the district court expressly found that "the surrounding districts" were *not* "innocent" of unconstitutional activity, since they "continually sought to avoid being included in a school district with [Braddock and Rankin] due to the high concentration of blacks" in those areas. *Hoots VI*, 510 F. Supp. at 620-21.

tive effect would leave them without a remedy, burden shifts to defendants), *cert. denied*, 446 U.S. 923 (1980).

44. We have carefully considered the contentions of each of the defendant school districts that the district court was clearly erroneous in determining that their noninclusion in a district with the GBASD was due to racial considerations. In light of the burden of proof, we are not persuaded that the district court committed error in rejecting the defendants' claims that not race but factors such as "transportation difficulties," the quality of the school districts' curricula, and so on, lay behind the noninclusion of Edgewood, Swissvale, Turtle Creek, and Churchill. *See Keyes, supra*, 413 U.S. at 210 (once burden is shifted to defendants, "it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions").[14]

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14. Churchill argues strenuously that it stands in a different position from any of the other defendants. First, it argues that the school district reorganization in central eastern Allegheny County was finally completed under Act 150, and that Act 150 contained a "grandfather clause" which protected any school district created before the passage of Act 150 from being consolidated against its wishes with another school district. As Churchill was created out of the consolidation of three smaller districts before Act 150 was passed, and as Act 150 was never itself attacked as racially discriminatory, Churchill concludes, the district court had no basis for holding that the failure to include Churchill in a larger district was based even in part on racial considerations. We agree with the district court, however, that "[t]his argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561." *Hoots VI, supra*, 510 F. Supp. at 621.

Second, Churchill points to a statement by the continued district court in a Memorandum and Order dated November 18, 1977, that "no evidence exists of a deliberate, purposeful, segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance." Appendix 841a. As we read the district court's statement, however, it merely indicates that the formation of Churchill out of Wilkins, Forest Hills, and Chalfant (all of which were white districts) was not racially motivated. That statement, however, is no different from Edgewood's

45. In its April 28, 1981 opinion, rendered after the April 20-21 hearings, the district court set forth very clearly its reasons for the remedy in question:

> (1) It would produce a district with a school population 83% white and 17% minority (mostly black), within a general range of recognized desegregation guidelines and comparable to the population distribution over a wide area of Allegheny County.
>
> (2) The pattern of desegregation established is likely to remain stable.
>
> (3) All of the districts included are contiguous to each other, three of the districts border General Braddock, and the remaining district, Edgewood, borders one and almost borders another.
>
> (4) The area of the New District is moderate in size (13.5 sq. miles) as compared to the average size of Allegheny County Districts (15 sq. miles).
>
> (5) The district is roughly circular in configuration, lending itself to increased administrative and transportation efficiencies.
>
> (6) All points in the district are within 2.5 miles radius of its center, and the greatest diameter from one edge of the district to the other is less than 5 miles.

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argument that its lack of desire for a merger with another white district — Swissvale — disproves any racial motivation. Both arguments miss the point: whether a school district desires to merge with other white districts (as in the case of the three which merged to form Churchill), or does not (as in the case of Edgewood and Swissvale), says little about whether that district's failure to be included in a still larger district along with GBASD, was due to racial considerations. Thus the district court's 1977 observation in no way undermines the district court's present conclusion that it was not simply under Act 150 but in the entire process of reorganization from Act 561 on that the violation occurred.

(7) Student population density of the New District would be 821 per square mile, a high density compared to the 275 per square mile density of the average Allegheny County School District (excluding the City of Pittsburgh).

(8) Student population of the New District would be 9,132 in 1981, which exceeds the minimum of 4,000 students mandated for merged districts under the statutory and regulatory guidelines of the Commonwealth of Pennsylvania.

(9) Student enrollment in all of the merged districts has been declining at a rate exceeding 35% in the past ten years, and from the student population figures in grades from kindergarten to 12th grade may be expected to decline at a comparable rate in the next eight years, all of which indicates a need for consolidation to achieve educational efficiency and economy.

(10) All of the merged districts have excess capacity, in most cases substantial, at all instructional levels, making the excess capacity for the New District 40%. This will increase as the student population continues to decline. This excess capacity could be greatly reduced by the merging of these districts, the merging of student population, the discontinuance of old buildings requiring extensive repairs, allowing for a better organized comprehensive educational program without additional cost, and the possibility of very substantial savings in costs, as well as achieving desegregation.

(11) The New District will be strongly interconnected by available transportation arteries, and the relatively short distances between most parts of the district will minimize the time and mileage involved in any additional transportation needed.

(12) The existing transportation facilities of the merged districts, should be adequate to serve the transportation needs of the New District.

(13) Inasmuch as a substantial number of public school students in the present district are bussed, and because of the limited distances in the New District, it is not contemplated that any large increase in the total mileage or number of students transported will result from the consolidation.

(14) The proposed New District will be financially viable, having a higher tax base per student than the state average, and higher than some of the present districts included.

Hoots VIII at 6-8; Appendix at 889a-891a.[15]

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15. The district court also gave reasons for inclusion of each individual district in the new district:

(1) *General Braddock*: This district must be in any remedy because its intentional creation as a racially identifiable black school district constituted the constitutional violation found in this case. Its 64% black student population in a larger area where the surrounding districts vary from less than 1% to a maximum of 13% black makes it mandatory for inclusion. It has continued serious financial problems that make its future as a viable district uncertain.

(2) *Turtle Creek* is included because it is contiguous to the General Braddock area, and also contiguous to Churchill which is also included in the New District. It is racially identifiable as a white school district (98%), it is small in area (1.37 miles), and has a high density of pupils per square mile (920), it has significant unused building capacity, particularly in its high school, and has experienced dropping enrollment and faces a continuing decline. Its present 1,200 student population in the face of a state standard of 4,000 students required for an adequate educational program renders its future as a viable independent school district cloudy. It has adequate transportational connection with the rest of the New District. It has close community business and occupation ties with the General Braddock Area District and also with the Churchill Area. It faces the same economic problems as the General Braddock district.

46. In a recent statement of the proper role of an appellate court in reviewing the trial judge's exercise of his discretion, we stated that a judge abuses his discretion "only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used." *Evans v. Buchanan*, 555 F.2d at 378-79, *citing Lindy Bros. Builders, Inc. v. American*

NOTE 21 — *(Continued)*

(3) *Churchill* is included because it is contiguous to General Braddock, as well as contiguous to Turtle Creek, Swissvale, and almost if not actually contiguous to Edgewood. It is identifiable as a 99.2% white school district. It has excess capacity in its facilities and declining enrollment. Its geographical position puts it in the heart of the New District, and its exclusion from the compact formation of the New District would make all of the consideration of geographical contiguity and compactness of the New District meaningless. Its economic strength would add financial stability to the new district.

(4) *Swissvale* is included because it is contiguous to the General Braddock Area District, as well as contiguous to Churchill and Edgewood in the New District, it is small in geographic area but with a high density of pupils per square mile (771), it is small in student population (1,757), below the minimum state standard requiring consolidation, and its student population. It has many connecting arteries of transportation with the rest of the New District. Its exclusion would result in a large vacuum between the other areas of the New District because of its central position in the configuration and its nexus of transportation arteries connecting other parties of the New Disrict.

(5) *Edgewood* is included because it is identifiable as a white school district (98%) in a general area the composition of which is 17% black, and where the adjoining district, Swissvale is 13% black, its very small geographic size, (½ sq. mile), its high student population (731), which has declined and will continue to decline, and its substantial underutilization of facilities. It is close to many other schools in the New District, and has ready transportation access to the other areas included in the consolidation. We recognize that Edgewood was granted an exemption from the 4,000 minimum student population requirement after much litigation, but its student population has continued to decline. It is highly commendable that this district

Radiator and Standard Sanitary Corp., 540 F.2d 102, 115-16 (3d Cir. 1976) (en banc). Using this standard of review, we find that the district court did not abuse its discretion in fashioning its multidistrict remedy. Indeed, the district court's action fully complied with all applicable standards and was supported by more than enough evidence.

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has been able to attract 100 tuition students from Pittsburgh and other districts to help fill the underutilized facilities, and that it is able to receive $1,000 or $1,200 per tuition student in this process, bringing substantial additional revenue to the district. However, it is possible for Edgewood to educate these additional students at a figure much less than the average cost of education per pupil because of the economic law of marginal cost, no increase of operating costs is involved in the utilization of the empty classroom seats. However, in so doing Edgewood has entered the business of private education of its own residents. This is contrary to the Commonwealth's school district reorganization policy. Edgewood's inclusion rounds out the compact shape of the district, and adds financial stability to the new District.

All of these districts are properly subject segregation of the General Braddock Area School District because of their involvement in the violations which led to the creation of the General Braddock Area School District as set forth in our Opinion of March 5, 1981.

Appendix at 892a-895a.

The 1980-81 percentages of black enrollment in the New School District's constituent parts are helpful in understanding the desegregative purpose and effect of the district court remedy:

School District	1980 1981 Enrollment	Black	% Black
Churchill	3,342	27	.8%
Edgewood	731	16	2.2%
Gen. Braddock	2,042	1,279	62.6%
Swissvale	1,757	223	12.7%
Turtle Creek	1,260	24	1.9%
Total	9,132	1,569	17.2%

Appendix at 3233a.

CONCLUSION

47. For the foregoing reasons, the judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1691, 81-1692, 81-1693,
81-1694, 81-1695, 81-1790,
81-1986, 81-1987 and 81-1988

DOROTHY HOOTS, *et al.*,

v.

COMMONWEALTH OF PENNSYLVANIA *et al.*,

(CAPTION ABBREVIATED IN PRINTING)

Appeal From The United States District Court
For The Western District Of Pennsylvania
D.C. Civil No. 71-0538

Present: GIBBONS, HUNTER and GARTH, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on December 18, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered: April 28, 1981 (C.A. Nos. 81-1691/2/3/4 and 81-1986/7/8); March 5 and 24, April 6 and 15, 1981 (C.A. No. 81-1790); and, May 6, 1981 (C.A. No. 81-1695), be, and the same are hereby affirmed in accordance with the opinion of this Court. Costs taxed against appellants.

ATTEST:

/s/ SALLY MRVOS
Sally Mrvros
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-538

DOROTHY HOOTS *et al.*,

v.

COMMONWEALTH OF PENNSYLVANIA *et al.*,

(CAPTION ABBREVIATED IN PRINTING)

OPINION

WEBER, C. J.

May 15, 1973

Introduction

This is a suit under the federal Civil Rights Act in which plaintiffs, as representatives of a class, allege that residents of the Borough of Braddock, North Braddock and Rankin, in Allegheny County, Pennsylvania, have been deprived of rights, privileges and immunities guaranteed them by the laws and Constitution of the United States by being forced to attend and send their children to a racially segregated school district created by the actions of the various defendants in preparing, approving and adopting plans of reorganization and consolidation of school districts in Allegheny County, particularly that creating the General Braddock Area School District, known as Administrative Unit No. 16, within whose boundaries these plaintiffs reside, and the approval of reorganization of surrounding school districts made at about the same time.

A great many of the factual issues in this case were resolved by agreement and stipulation. The statistical data submitted into evidence of the trial was received largely without objection. The defendants submitted two documents as exhibits but offered no testimony.

As a result we find the facts to be almost entirely in accord with those findings proposed by plaintiffs' counsel after the close of the evidence. The findings are sufficiently detailed so as to allow us to proceed without a further narrative account of the background of this litigation.

Findings Of Fact

A. *Parties*

1. Plaintiffs include Addrallace Knight and Barbara Smith.

2. Plaintiff Addrallace Knight is a black woman who has resided in the Borough of Braddock, Pennsylvania, for 20 years and is the mother of three children presently enrolled in the public schools of the General Braddock Area School District in grades 2, 4 and 12, of three children formerly enrolled and still eligible to be enrolled in the public schools of the General Braddock School District, and of two children in college who graduated from the School Districts of Braddock and the General Braddock Area, respectively.[1] T. 2, T. 30.

3. Plaintiff Barbara Smith is a black woman who has resided in the Borough of Braddock for 28 years and is the mother of children enrolled in the public schools of the General Braddock Area School District in grades 3, 4, 5, 9, 10 and 11. T. 63, 64.

4. Plaintiffs Addrallace Knight and Barbara Smith instituted this suit to alter the boundaries of the General Braddock Area School District. T. 30, 63.

5. Named Plaintiffs bring the suit as a class action on behalf of all parents and children residing in the boroughs of Braddock, North Braddock and Rankin. Named Plaintiffs' claims are typical of the claims of the class and named Plaintiffs will fairly and adequately protect the interests of the class. T. 40, 46, 100, 101.

6. Defendant Commonwealth of Pennsylvania has the duty under Article III, Section 14 of the Pennsylvania Constitution, P.S., to maintain and support a thorough and efficient public school system. (Paragraph 35 of Plaintiffs' Complaint, Admitted.)

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[1] "T." ____ refers to the page of the Transcript of Trial.

7. Defendant Commonwealth of Pennsylvania has the ultimate power, authority and responsibility to create school districts and to establish and alter boundaries of the areas served by said school districts. (Paragraph 36 of Plaintiffs' Complaint, Admitted.)

8. Defendant Pennsylvania State Board of Education ["State Board"] is a state administrative board charged with the general supervision and control of the educational interests of the Commonwealth of Pennsylvania, and Defendant W. Deming Lewis is the Chairman of that Board. (Paragraphs 33 and 34 of Plaintiffs' Complaint, Admitted.)

9. Defendant Allegheny Intermediate Unit Board of School Directors is an administrative body which became operative as of July 1, 1971 and is charged with providing the essential services formally provided by the Allegheny County Board of School Directors ["County Board"] and with the administration of the program of services of Intermediate Unit 3 comprising all school districts in the County of Allegheny outside of the City of Pittsburgh, and Defendant Edward X. Hallenberg is the President of such Board. (Paragraphs 38(b) and 38(c) of Plaintiffs' Complaint, Admitted.)

B. *School Reorganization Legislation And Standards*

10. During the 1960's the Pennsylvania Legislature on three occasions enacted legislation to reorganize the administrative units (i.e. school districts in Pennsylvania's public school systems.

(a) the first Act — the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. § 2-281 et seq. (Act 561) — directed each county board of school directors to prepare on or before January 1, 1963 a plan of organization of administrative units for the County for review by the State Council of Education. 24 P.S. §§ 2-282, 2-283.[2] S.1.

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[2] The reference to "S" ____ means the paragraph of the Stipulation of Facts, Ex. 61 of the record.

(b) Act 561 was superseded by the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290 et seq. (Act 299). Act 299 directed each county board of school directors to prepare on or before July 1, 1964 a plan of organization of administrative units for the county and directed the State Council of Basic Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise in the best interest of the educational system of the Commonwealth, provided that these plans met certain requirements specified in Act 299. 24 P.S. §§ 2-292, 2-293. S. 2. In preparing reorganization plans pursuant to Act 299, the county boards were not bound by any proposals contained in reorganization plans prepared pursuant to Act 561, 24 P.S. § 2-292. In dealing with school districts which had previously entered into a written agreement for the establishment of a joint school or department, however, the county boards were prohibited from proposing any administrative units which in whole or in part comprised less than all of the school districts joined by such agreement. 24 P.S. § 2-292.

(c) Act 299 was superseded by the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. § 2400.1 et seq. (Act 150). Act 150 directed each county board of education to prepare within 90 days a plan of organization of administrative units limited to those school districts within the county which were not in an administrative unit established as a school district under Act 299. 24 P.S. § 2400.2. S. 14.

11. Acts 299 and 150 both provided for the plan of organization of administrative units to conform to standards for approval of administrative units adopted by the State Board and directed the State Board to prepare such standards, taking into account the following factors: topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education. 24 P.S. §§ 2400.1 and 2400.2; 24 P.S. §§ 2-291 and 2-292. Both Acts also provided that no plan of organization of administrative units should include any proposed school district with a pupil population of less than 4000 unless the factors listed above were considered by the State Board (or Council of Basic Education) as requiring approval of a plan in which any district contained a pupil population of less than 4000. 24 P.S. § 2400.3, 24 P.S. § 2-293.

12. Pursuant to the above provisions of Acts 299 and 150, the State Board adopted Standards for Approval of Administrative Units. These Standards, *inter alia* provided that:

(a) An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities and interests of individuals residing in the administrative unit.

(b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

A letter from the Superintendent of the Department of Public Instruction advised the County Boards, including the Allegheny County Board, that the intent of the language of the last sentence of the above paragraph was to prevent de jure segregation through the fixing of school district boundaries and that the language was not to be construed to permit de facto segregation on the basis of race, religion or national origin which is by law prohibited. Exhibit 40, T. 271-276.

(c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

(d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods.

(e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Exhibits 12, 60.

C. *School Districts Established By The State And County Boards*

13. In the central eastern area of Allegheny County, east of the City of Pittsburgh and north of the Monongahela River, the County and State Boards established the General Braddock Area School District; the School Districts of Turtle Creek, Swissvale Area, Churchhill Area and East Allegheny which border on the General Braddock Area School District; and the Edgewood School District which is situated within approximately one mile of the General Braddock Area School District. Exhibits 59, 13, 4, 10.

14. The General Braddock Area School District came into being on July 1, 1971 and serves the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. This School District composed of Braddock, North Braddock and Rankin was proposed in the organization plan adopted by the County Board pursuant to Act 150 on October 7, 1968 and was approved by the State Board on May 9, 1969. Prior to July 1, 1971, the School Districts of Braddock, North Braddock and Rankin served the Boroughs of Braddock, North Braddock and Rankin, respectively. S. 15, 21, 24, 26; Ex. 10, 13, 37.

15. The Turtle Creek School District serves the area consisting of the geographic limits of the Boroughs of East Pittsburgh and Turtle Creek. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 37.

16. The Swissvale Area School District serves the area consisting of the geographic limits of the boroughs of Braddock Hills and Swissvale. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 37.

17. The Churchill Area School District serves the area consisting of the geographic limits of the municipalities of Chalfont, Churchill, Forest Hills and Wilkins. This School District was established pursuant to Act 299. S. 15; Ex. 4, 10, 13, 36.

18. The East Allegheny School District serves the area consisting of the geographic limits of the municipalities of East McKeesport, North Versailles, Wall and Wilmerding. This School District was established pursuant to Act 299. S. 15; Ex. 4, 10, 13, 36.

19. The Edgewood School District serves the area consisting of the geographic limits of the Borough of Edgewood. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 13, 37.

D. *Characteristics Of Braddock, North Braddock And Rankin*

20. Braddock, North Braddock and Rankin are economically depressed, declining communities. T. 47, 48, 66, 120, 135-137.

21. The housing within these three municipalities is old and substandard. Ex. 23, 49; T. 50, 134-135.

22. The residents of these municipalities are poor and less educated. Ex. 20, 50, 51, 56.

23. The municipal taxes of these municipalities are higher than average. Ex. 25.

24. The recreational and shopping facilities within these three municipalities are extremely limited. T. 49-50, 65, 134, 135.

25. The populations of these three municipalities have been rapidly declining at an accelerated pace and becoming increasingly older. From 1930 to 1970 the combined populations of Braddock, North Braddock and Rankin declined from 44,067 to 23,335 and the median age of these populations increased from approximately 27 years in 1940 to approximately 35 years in 1970. Ex. 15, 16.

26. The Boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. T. 47, 48, 64-66, 120, 220, 221, 225-228; Findings of Fact 20-25.

E. *Population Trends — Race*

27. The populations of Braddock, North Braddock and Rankin are becoming increasingly non-white at an accelerated rate. From 1930 to 1970 the percentages of the non-white populations of Braddock, North Braddock and Rankin increased as follows: Braddock — 11.54% to 36.33%; North Braddock — 2.91% to 11.04%; Rankin — 19.56% to 35.48%; and combined populations — 9.7% to 24.7%. The largest increase in the non-white percentage of the combined

populations of Braddock, North Braddock and Rankin has occurred in the last two decades as is shown in the table below which sets forth the increase in the percentage of non-white population for each of the past four decades:

	1930-1940	1940-1950	1950-1960	1960-1970
Braddock	.7%	4.0%	7.3%	12.8%
North Braddock	.2%	1.8%	2.4%	3.8%
Rankin	2.2%	7.3%	5.0%	1.4%
Combined[3]	.8%	3.7%	4.1%	6.4%

Ex. 15

28. The increase in the percentages of the non-white populations of Braddock, North Braddock and Rankin is attributable almost entirely to a declining white population within these municipalities. From 1930 to 1970 the white populations of these three boroughs decreased as follows:

	1930 White Population	1970 White Population	Loss
Braddock	17,096	5,527	11,569
North Braddock	16,290	9,641	6,649
Rankin	6,391	2,462	3,929
Combined Population	39,777	17,630	22,147

Ex. 15

[3] This shows the increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin.

The greatest portion of the loss in the white populations of these municipalities has occurred in the last two decades as shown in the table below which sets forth the average yearly decline in the white population for each of the past four decades:

Average Yearly Decline

	1930-1940	1940-1950	1950-1960	1960-1970
Braddock	101	228	438	399
North Braddock	109	120	176	260
Rankin	55	92	152	94
Combined Loss	265	440	766	744

Ex. 15

29. Over the past four decades there has been an even greater increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin. From 1930 to 1972 the non-white percentages of the public school populations of these municipalities increased as follows:

% of Non-White Enrollment

	1930	1960	1970	1972
Braddock	8%	41%	72%	80%
North Braddock	2%	8%	16%	22%
Rankin	17%	34%	51%	57%
Combined	7.1%	23.7%	38.7%	44.5%

Ex. 18

Yearly Increase in Non-White Enrollment

	1930-1960	1960-1970	1970-1972
Braddock	1.1%	3.1%	4%
North Braddock	.2%	.8%	3%
Rankin	.6%	1.7%	3%
Combined	.5%	1.5%	3%

Ex. 18

30. This substantial increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin is attributable almost entirely to a steady decline in the white public school populations of Braddock, North Braddock and Rankin over the past 42 years:[4]

White Public School Populations

	1930	1960	1970	1972
Braddock	3,085	1,096	332	198
North Braddock	4,400	2,481	1,955	1,576
Rankin	1,617	685	398	295
Combined	9,102	4,262	2,685	2,069

Ex. 18

Average Yearly Decline in White Public School Populations

	1930-1960	1960-1970	1970-1972
Braddock	66	76	67
North Braddock	64	53	190
Rankin	32	29	52
Combined	162	158	309

Ex. 18

[4] From 1930 to 1972 the black public school populations of Braddock, North Braddock and Rankin increased from 696 to 1656.

31. This Court relies on the uncontradicted testimony of expert witness John A. Finger that there is no basis for believing that the characteristics which caused the decline in the white populations of Braddock, North Braddock and Rankin over the past years have changed; that while all white families may not move out, new white families will not move in and there will be fewer and fewer young white children; that it is extremely likely that these municipalities have reached the tipping point of becoming primarily a black area; and that Braddock and Rankin will become 100% black or nearly so and North Braddock will develop the same characteristics unless remedial action is taken as to the General Braddock Area School District because of the relationship of school population to residential neighborhood stability.[5] T. 219-228.

32. This Court finds that the creation of the General Braddock Area School District is an unstable influence on the public school populations of Braddock, North Braddock and Rankin that will cause an increasing number of white students to leave the public schools of Braddock, North Braddock and Rankin.[6] T. 40, 104, 288.

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[5] This testimony is also supported by the data in Exhibit 16 which shows that the white populations of Braddock, North Braddock and Rankin are much older than the black populations of these municipalities; that the younger segments of the populations are becoming increasingly non-white; and that, in fact, the non-white percentage of the combined populations of these municipalities between the ages of 0-14 is twice as great as the non-white percentage of the combined populations over the age of 44.

[6] In its 1936 Underwriter's Manual the FHA recognized that the development of a neighborhood is strongly influenced by the type of schools:

> "if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist." Bradley v. School Board of City of Richmond, Virginia, D.C., 338 F.Supp. 67, at 215-216. Also see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, at 20-21, 91 S.Ct. 1267, 28 L.Ed.2d 554.

Note also that in the last two years the annual decline in the white public school populations of Braddock, North Braddock and Rankin doubled

33. On the basis of findings of fact 20 through 32, this court finds that there is every reason to believe that the white public school populations of Braddock, North Braddock and Rankin will continue to decline by at least the same number as over the past several years and that the enrollment of the General Braddock Area School District will be almost entirely black within the next five to ten years.

F. Comparison With Neighboring Municipalities.

34. The area served by the General Braddock Area School District has perhaps the highest concentration of blacks of any area within Allegheny County served by a single school district. As of 1970 Braddock, Rankin and North Braddock ranked first, second and eleventh, respectively, of the 129 municipalities within the County in terms of their percentage of black residents. Ex. 14

35. This central eastern portion of Allegheny County is generally divided along racial lines. The black residents of this portion of the County are contained within Braddock, North Braddock and Rankin and largely excluded from other municipalities within the area. This is illustrated by the following table which sets

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primarily because in North Braddock (the source of 76% of General Braddock Area School District's white students) the annual decline in white students increased from 53 to 190. See Finding of Fact 30.

Also see United States v. Board of School Commissioners, Indianapolis, Ind., D.C., 332 F.Supp. 655, at 676, where the Court said:

> "The undisputed evidence in this case . . . is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible."

forth the black populations as of 1970 for Braddock, North Braddock, Rankin and the other municipalities within the area:

	Black	Total	% Black
Braddock	3,139	8,682	36.16
North Braddock	1,194	10,838	11.02
Rankin	1,351	3,817	35.39
Chalfont	12	1,370	.88
Churchill	5	4,690	.11
East McKeesport	26	3,233	.80
Braddock Hill	293	2,494	11.75
East Pittsburgh	116	3,006	3.85
Edgewood	66	5,101	1.29
Forest Hills	26	9,561	.27
North Versailles	1,025	13,416	7.64
Swissvale	567	13,891	4.10
Turtle Creek	15	8,308	.18
Wall	32	1,265	2.53
Wilkins	49	8,479	.56
Wilmerding	94	3,218	2.92

36. Pervasive racial discrimination which restricts the housing opportunities of blacks in the eastern portion of Allegheny County is a factor which accounts for the concentration of blacks within Braddock, North Braddock and Rankin. T. 42-43, 70-77; Affidavits of Brock, Cox, DeCostro, Strader.

37. The percentage of non-white enrollment of the General Braddock Area School District is much greater than that of any of the surrounding school districts. As of 1971 the percentages of non-white enrollment of the General Braddock Area School District and surrounding school Districts were as follows:

General Braddock Area School District	44.98
Churchill	.78
Edgewood	6.08
East Allegheny	8.89
Turtle Creek	1.3
Swissvale	9.6

Ex. 17

38. The General Braddock Area School District also has a much greater non-white enrollment than almost every other school district within the entire county. As of 1971 of the 46 school districts operating within Allegheny Counmty (excluding Pittsburgh),[7] only 15 districts had a non-white enrollment in excess of 5%, only eight districts had a non-white enrollment in excess of 10%, only 4 districts had a non-white enrollment in excess of 30%,[8] and only two districts — Wilkinsburg and General Graddock Area — had a non-white enrollment in excess of 40%. Ex. 17

39. The school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with Braddock and Rankin because of the high concentration of blacks within the Braddock and Rankin School Districts. These surrounding districts proposed to the County and State Boards mergers that would include almost any school districts in the vicinity other than Braddock and Rankin. S. 4, 7, 9, 10, 17, 18; Ex. 5, 7, 8; 35A (p. 11), 42, 46, 47; T. 82-85, 93-100, 107-108, 120-122.

40. The General Braddock Area School District is racially identifiable as a black school district. Findings of Fact 34-39; S. 17, 18; T. 40, 46, 84, 93-95, 98-100, 104, 246, 247, 268-272, 276.

G. *Alternatives To A School District Of Braddock, North Braddock and Rankin*

41. Braddock, North Braddock and Rankin are not geographically isolated; they are easily accessible to most other municipalities within this central eastern portion of the County; and

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[7] Pittsburgh is excluded because for organization of administrative units and other purposes the jurisdiction of the County Board covers all Allegheny County school districts except Pittsburgh.

[8] Of the four districts with a non-white enrollment in excess of 20% (Wilkinsburg, General Braddock Area. Clairton and Duquesne), the General Braddock Area School District was the only newly created school district. The boundaries of the School Districts of Wilkinsburg, Clairton and Duquesne are identical to the municipal boundaries of these municipalities and these boundaries were not affected by school reorganization within Allegheny County. (Exhibit 13)

they have not historically developed the characteristics of a single community (defined by the Standards for Approval of Administrative Units — Ex. 12 - - as one or more municipalities and the surrounding territory from which people come for business, social, recreational, fraternal or social reasons). Thus alternatives to a school district comprised of Braddock, North Braddock and Rankin were available to the County and State Boards. Ex. 8, 59; T. 45, 88, 116-119, 131, 133-134.

42. One such alternative was a school district composed of Braddock, North Braddock, Rankin, East Pittsburgh and Turtle Creek. Such a school district as of 1967 would have had an enrollment of 5894 of which approximately 27% would have been non-white. Ex. 17.

The plan of organization of administrative units prepared by the County Board pursuant to Act 299 proposed a school district composed of these five municipalities. The minutes of a meeting of the County Board which discussed this proposed school district state that all members of the Board agreed that this was a satisfactory unit and that this unit met the standards for pupil population, utilization of existing buildings and capabilities of providing comprehensive education. Also a report prepared by the Department of Public Instruction described a unit consisting of these five municipalities as "a natural."[9] S. 3, Ex. 8, 45.

43. A second alternative was a school district composed of Braddock, North Braddock, Rankin, Braddock Hills and East Pittsburgh.

The plan of reorganization of administrative units prepared by the County Board pursuant to Act 561 proposed a school district com-

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[9] None of these five municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 which protected established school districts did not preclude a district composed of these five municipalities. Ex. 4, 10.

posed of these five school districts. A report prepared by the County Board in connection with the preparation of this plan stated that a district composed of these five municipalities would make possible the placement of every pupil — grades 7, 8 and 9 — in a bona fide junior high school and that all senior pupils could have an expanded high school program. S. 1, Ex. 35 (p. 10); T. 83-84.

44. A third alternative was one school district composed of Swissvale, Rankin, Braddock Hills and perhaps Edgewood and a second school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh. A school district composed of Swissvale, Rankin, Braddock Hills and Edgewood as of 1967 would have had an enrollment of 3940 of which approximately 14% would have been non-white and a school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh would have had an enrollment of 5280 of which approximately 24% would have been non-white.[10] Ex. 17

All witnesses familiar with this area of Allegheny County testified that for geographic reasons alone, Rankin should be in the school district which included Swissville rather than a school district which included Braddock. The feasibility of placing Rankin in the school district which included Swissvale is so obvious that William Rea, a member of the State Board who heard the appeal of the Rankin School District from the County Board's plan which combined Braddock, North Braddock and Rankin into one school district, asked if there was any way the State Board could find out why the County put Rankin with Braddock and North Braddock "rather than the logicl geographical thing, looking at the map, of Swissvale because it seems to me that the State Board needs to have some reasons here." T. 88, 131, 134; Ex. 54 (p. 23); Ex. 59.

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[10] None of these municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 protecting established school districts did not preclude the Boards from proposing the alternative suggested in finding of fact 44.

45. A review of the map of this central eastern area of Allegheny County indicates that at least from the standpoint of transportation, other alternatives (in addition to the three mentioned above) to a school district composed of Braddock, North Braddock and Rankin could also have been selected. Ex. 59, Ex. 11.

H. ***Refusal To Properly Consider Race.***

46. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this Court finds that in establishing boundary lines for school districts, the racial composition of the student body of the proposed school district is an important factor to be considered to maximize the social and educational benefits which accrue from attending a racially integrated school system and to minimize the foreseeable and avoidable adverse social and educational effects which result from attending racially segregated schools. T. 162, 163, 232-234, 264-5; Ex. 58, 41.

47. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this court finds that there is no educational or other valid justification for disregarding racial criteria in establishing school district boundary lines. T. 162-168, 234-239, 271-275.

48. In preparing and adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district pursuant to Act 150, the County and State Boards refused to give consideration to the foreseeable and avoidable adverse educational and racial effects that could result from the concentration of black pupils within this proposed school district. S. 19, 23.

49. This court finds that if the County and State Boards had properly considered race in preparing and approving a plan of organization of administrative units for Allegheny County pursuant to Act 150, these Boards would not have approved a plan which combined Braddock, North Braddock and Rankin into a single school district. In support of this finding, this court relies on the uncontradicted testimony of plaintiffs' expert witnesses that had race been properly considered, for educational reasons alone the Boards would not have concentrated the black residents of this area within this one school system. T. 162, 166-168, 244, 268-271, 276-277.

50. This Court accepts the uncontradicted testimony of plaintiffs' expert witnesses on the basis of the demographic data which was clearly available, the State an County Boards knew or should have known they were creating a racially segregated school district as of the dates they proposed and approved as school district composed of Braddock, North Braddock and Rankin. T. 219-224, 230-232, 251-253, 276-277.

Demographic data available to these Boards as of such dates included information on the racial composition of the public schools of Braddock, North Braddock and Rankin and surrounding school districts (S. 6, 17, 22, Ex. 47) as well as data of the U.S. Census Bureau and public schools of Braddock, North Braddock and Rankin showing the population trends by race of the public school populations and general populations of Braddock, North Braddock, Rankin and surrounding areas. (See, for example, Exhibits 15, 16 and 18).

Merely by considering the data collected by the County Board and Department of Public Instruction showing the white and non-white enrollment in each school district within Allegheny County as of 1964 and 1967 (Exhibit 17), the County and State Boards should have known that a school district of Braddock, North Braddock and Rankin would be a racially segregated school district that would become increasingly non-white. As of 1967, Braddock, Rankin and North Braddock ranked 1, 2, and 7 of the 61 school districts in Allegheny County (excluding Pittsburgh) in terms of percent of non-white enrollment and, as the table below shows, were the only school districts within this central eastern portion of Allegheny County with significant concentration of non-white students:

Percent of non-white students

	1964	1967
Braddock	56.69	63.84
North Braddock	14.22	19.62
Rankin	44.7	51.30
East Pittsburgh	14.15	6.08
Turtle Creek	0.00	0.00
Swissvale	5.5	9.91
Edgewood	0.00	0.00
Churchill	.17	0.41
East Allegheny	—	9.88

Ex. 17

51. The County and State Boards maximized racial segregation within the public schools of this central eastern portion of Allegheny County by creating a school district composed of Braddock, North Braddock and Rankin. As of the dates on which the County Board prepared and State Board approved the combining of the school districts of Braddock, North Braddock and Rankin into a single school district, no other combination of school districts within this portion of Allegheny County would have created a school district (of at least 4,000 pupils as required by Act 150) with as large a percentage of non-white enrollment as the combination of Braddock, North Braddock and Rankin. See Ex. 17.

1. The Boards' plan disregarded Standards for School Reorganization as well as recognized educational standards.

52. The plan of organization of administrative units adopted by the County and State Boards pursuant to Act 150 for the central eastern portion of Allegheny County failed to meet many essential requirements of Act 150, the State Board Standards for Approval of Administrative Units ("State Board Standards"), policies of the Department of Public Instruction and Human Relations Commission of Pennsylvania, and recognized educational standards. T. 157-162, 235-241, 262-265, 268-272, 277-281. Examples of essential requests that weren't met include:

(a) Act 150 required that each proposed school district have a pupil population of at least 4,000 (unless a smaller school was required). See Finding of Fact 11. The plan adopted by the County and State Boards completely disregarded this requirement by combining the school districts of East Pittsburgh and Turtle Creek which had a 1967 combined enrollment of 1898, [11] by combining the school districts of Braddock Hills and Swissvale which had a 1967

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[11] It is noted that as of 1964 the County Board recognized that a school district of Turtle Creek and East Pittsburgh would not comply with the state pupil population requirements and therefore it refused to consider such a school district. Ex. 45, 6. At that time Turtle Creek-East Pittsburgh public school population was 2234. (Ex. 36.)

combined enrollment of 1925 and by permitting to stand alone the school district of Edgewood which had a 1967 pupil population of 928, Ex. 37; T. 159-161, 239-241. Even the school district of Braddock, North Braddock and Rankin violated the spirit of this requirement because as of 1967 it was obvious that the enrollment within these districts (which was slightly in excess of 4000) was declining rapidly and that the pupil population of this district would stabilize at a population far below 4000. [12]

(b) The State Standards as well as recognized educational standards require creation of school districts capable of providing a comprehensive program of education. Finding of Fact 12e. Because of the concentration of non-white children from poor and educationally-deprived homes within the district, the General Braddock Area School District did not meet this requirement according to uncontradicted testimony of plaintiffs' expert witnesses. T. 161, 162, 241-246, 277-281.

(c) Guidelines of the Department of Public Instruction and the Human Relations Commission of Pennsylvania in effect prior to the County Board's preparation of the plan of administrative units pursuant to Act 150 (as well as accepted educational standards) recognize the importance of the presence of children from varied backgrounds within every school building. Such policy specifically provides that any action which fosters racial segregation in the public schools is against the public interest and should not be taken by any public agency. Ex. 58, 41. T. 264, 265. The County and State Boards acted contrary to these guidelines (as well as the policy expressed in the letter from the Superintendent of the Department of Public Instruction stating that de facto segregation on the basis of race is by law prohibited — (see finding of fact 12b) by concentrating black children and children from poor, educationally deprived homes within one single school district. T. 158-159, 234-238, 241-246, 258-265, 268-276, 283-284.

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[12] State Board standards permitted consideration of population changes. See Findings of Fact 12a.

(d) The County and State Boards also ignored the State Board Standard requiring maximum utilization of existing buildings by separating East Pittsburgh from North Braddock because of North Braddock's need for school buildings situated within East Pittsburgh. Finding of Fact 12c. Ex. 6, 7, 45.

53. Alternatives to a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with the provisions of Act 150, the State Board Standards for Approval of Administrative Units and recognized educational standards. Such alternatives include those set forth in findings of fact 42-44. T. 157-162, 241-242, 244-246.

54. In view of the availability of these alternatives, the decision of the County and State Boards to create a school district composed of Braddock, North Braddock and Rankin was contrary to recognized education standards, the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, and policies of the Department of Public Instruction and Human Relations Commission. T. 157-162, 241-242, 244-246.

55. These alternatives previously referred to that would have been more consistent with the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, recognized education standards and the policies of the Department of Public Instruction and Human Relations Commission would have permitted the black public school population of Braddock, North Braddock and Rankin to attend substantially more integrated public school systems. Ex. 17, Findings of Fact 42, 44, T. 158-162.

J. General Conclusions

56. On the basis of Findings of Fact 27 through 55 and the uncontradictory testimony of plaintiffs' expert witnesses, this Court finds that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. T. 247, 276, 219-227, 246-247, 276-277, 262-271.

57. On the basis of Findings of Fact 20 through 55 this Court finds that the natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into one school district was to perpetuate, exacerbate and maximize racial segregation within the public schools of this central eastern portion of Allegheny County.

58. On the basis of Findings of Fact 27 through 51 this Court finds that by combining the three municipalities within which most of the black population of the area resides into a single school district the County and State Boards built on the pattern of residential segregation within this central eastern portion of Allegheny County, the inevitable effect of which was to maintain, perpetuate, exacerbate, maximize and otherwise impose racial segregation in the public schools of this central eastern portion of the County.

59. On the basis of Findings of Fact 27 through 55 this Court finds that the County and State Boards devised this plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin. This Court can find no other explanation for the Boards' creating a school district composed of Braddock, North Braddock and Rankin and defendants have offered no explanation as to why this school district was created to refute the testimony of plaintiffs' expert witnesses that the creation of this school district cannot be justified under recognized educational standards, the provisions of Act 150 or the Standards for Approval promulgated by the State Board.

60. Because the State and County Boards in devising this plan of organization of administrative units for the central eastern portion of Allegheny County were influenced by the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, race was a factor, at least indirectly, in the formation of the school district composed of Braddock, North Braddock and Rankin.

61. The Record contains absolutely no evidence showing that the school district boundaries established in the County and State

Boards' plan of organization of administrative units are rationally related to any legitimate purpose and this Court finds that such boundaries do not promote any valid state interest. T. 158-162, 239-242, 244-246, 277-281; Findings of Fact 20 through 55.

Discussion — Joinder Of Necessary Parties

The only issue of law seriously contested in these proceedings has been the necessity of joinder of the school districts surrounding the General Braddock Area School District.

Fed.R.Civ.P. 19(a) requires the joinder of a party (1) whose absence prevents the granting of complete relief to the present parties, and (2) whose interest is such that his absence may impair his ability to protect that interest or submit the present party to multiply or inconsistent obligations.

The absence of the surrounding school districts does not affect the complete relief available to existing parties. The power to draw school district boundaries rests solely with the Commonwealth of Pennsylvania and the Pennsylvania State Board of Education. Local school districts have no power or control over their own boundaries. They can be altered at anytime by the Commonwealth. The surrounding school districts have no legal right to have their existing boundaries maintained and consequently they have no legal interest under the provisions of Fed.R.Civ.P. 19 which can be affected by the outcome of this litigation.

While surrounding school districts may be concerned with the results of this litigation and even be affected by it, this does not require their joinder under Fed.R.Civ.P. 19.

In Griffin v. State Board of Education, 239 F.Supp. 560 [E.D.Va. 1965] where public agencies were enjoined from paying tuition grants for use by private schools which practiced racial discrimination, it was held not necessary to join the private school's name. "The overriding answer is that no complaint is made against the schools themselves. The complaint is against the payers and not the ultimate recipients of the grant. It is the power to give, not the right to receive, which is in issue." (p. 566). Permissive intervention was allowed to

such private schools in Poindexter v. Louisiana Financial Assistance Commission, 258 F.Supp. 158 [E.D.La. 1966], aff'd, 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 [1968], the trial court stating: "These schools are not necessary parties, as far as the constitutionality of the tuition grant system is concerned." (p. 167).

We may note that the surrounding school districts were aware of this suit. The Attorney General of the Commonwealth of Pennsylvania sent letters on May 19, 1972 to four surrounding school districts informing them of the action and enclosing a copy of the complaint. He advised them that if relief were granted the present boundaries of their districts would undoubtedly be changed. He urged their immediate intervention. (Ex. 54, T. 4.) Also, a week before trial the Attorney General sent telegrams advising them that he would again move to compel their joinder, and urging them to intervene. (T. 3-4.) None chose to act.

We do not overlook the possibility that the adjoining districts may be required to be joined at some further stage of the proceedings, if such are necessary under our retention of jurisdiction of this matter. We shall provide in our order that the Commonwealth and the State Board allow the adjoining districts to be heard on the matter of developing a plan of desegregation.

We have, therefore, denied defendants' motions based on failure to join a necessary party under Fed.R.Civ.P. 19 up to the present stage of the proceedings.

Conclusions Of Law

1. This Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201 and 2202; 42 U.S.C. §§ 1983 and 1988.

2. A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were based wholly or in part on considerations of the race of students and which contributed to increasing racial segregation in the public schools. Kelly v. Guinn, 456 F.2d 100, 105-108 [9th Cir. 1972], petition for cert. filed, 41 U.S.L.W. 3114 [U.S. Sept. 12, 1972] [No. 72-341]; Davis v. School District of City of Pontiac, Inc.,

443 F.2d 573 [6th Cir. 1971], cert. denied, 404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186 [1971]; Spangler v. Pasadena City Board of Education, 311 F.Supp. 501, 521 [C.D.Cal. 1970], and cases cited therein.

3. School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools because of community sentiment or the wishes of a majority of voters. Bradley v. Milliken, [6th Cir. Dec. 8, 1972 slip opinion], aff'g 345 F.Supp. 914 [E.D.Mich. 1972], same 338 F.Supp. 582, 593 [1972]; United States v. School District 151 of Cook County, Ill., 432 F.2d 1147 [7th Cir. 1970] aff'g 301 F.Supp. 201, 230 [N.D.Ill. 1969], cert. denied, 402 U.S. 943, 91 S.Ct. 1610, 29 L.Ed.2d 111 [1971] and cases cited therein; Johnson v. San Francisco Unified School District, 339 F.Supp. 1315, 1341 [N.D.Cal. 1971] and cases cited therein; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 523 and cases cited therein.

4. School authorities are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, non-racial considerations. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25-26, 91 S.Ct. 1267, 28 L.Ed.2d 554 [1971]; Bradley v. Milliken, *supra*, 338 F.Supp. at 592 and cases cited therein; Kelly v. Guinn, *supra*, 456 F.2d at 105-107; United States v. School District 151 of Cook County, Ill., *supra*, 301 F.Supp. at 320.

5. The County and State Boards acted contrary to the Fourteenth Amendment by selecting school district boundaries for the central eastern portion of Allegheny County which conformed to and built upon patterns of residential segregation in this area of the county. Bradley v. Milliken, *supra*, slip opinion, at 9-10; Davis v. School District of Pontiac, *supra*, Sloan v. Tenth School District of Wilson County, Tenn., 433 F.2d 587, 589 [6th Cir. 1970]; United States v. Board of Education, Ind. School Dist. No. 1, Tulsa County, Okl., 429 F.2d 1253, 1259 [10th Cir. 1970]; Brewer v. School Board

of City of Norfolk, Va., 397 F.2d 37, 42 [4th Cir. 1968]; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 522.

6. When the natural and foreseeable consequences of actions taken by school authorities are to preserve segregation within the public schools or to hamper its removal, such actions violate the Fourteenth Amendment. Bradley v. Milliken, *supra*; United States v. Texas Education Agency, 467 F.2d 848, 863-864 [5th Cir. 1972] and cases cited therein at n. 23; United States v. School District 151 of Cook County, Ill., *supra*, 404 F.2d 1125; Spangler v. Pasadena City Board of Education, *supra*.

7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. Bradley v. Milliken, *supra*, 345 F.Supp. at 939-940; Kelly v. Guinn, *supra*; Davis v. School District City of Pontiac, Inc., *supra*, 443 F.2d 573 at 576; Sloan v. Tenth School District of Wilson County, Tenn., *supra*, 433 F.2d at 590; United States v. Board of Education, Ind. School Dist. No. 1, Tulsa County, Okl., *supra*, 429 F.2d at 1259 and cases cited therein; Johnson v. San Francisco Unified School District, *supra*, 339 F.Supp. 1341 and cases cited therein; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 522.

8. While the state may have no affirmative duty to eliminate public school desegregation when it has done nothing to create it, nevertheless when it seeks change, it must proceed in a fashion that will lessen previously existing school segregation. Bradley v. Milliken, *supra*; United States v. Texas Education Agency, *supra*, 467 F.2d at 863-864; Davis v. School District of City of Pontiac, Inc. *supra*; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 522-523.

9. The State and County Boards' refusal to consider racial criteria in adopting the plan of organization of administrative units pursuant to Act 150 constituted an explicit racial classification in that educational matters related to racial criteria were treated differently from educational matters related to other criteria. Lee v. Nyquist, 402

U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 [1971] aff'g 318 F.Supp. 710 [W.D.N.Y. 1970] (three judge); Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 [1969]; Bradley v. Milliken, 433 F.2d 897, 902-904 [6th Cir. 1970] and cases cited therein. Racial classifications are constitutionally suspect and will be upheld only if absolutely necessary to the accomplishment of a permissible state policy. Hunter v. Erickson, *supra;* Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [1967]; McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 [1964].

10. A violation of the Fourteenth Amendment's prohibition against discrimination having been found, this Court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed 1083 [1955]; Bradley v. Milliken, *supra,* slip opinion at 53; 345 F.Supp. at 937; Kelley v. Altheimer Ark. Public School Dist. No. 22, 378 F.2d 483, 489 [8th Cir. 1967].

11. On the basis of this Court's findings of unconstitutional school segregation, the present constitutional obligation of defendant school authorities is at the earliest possible time to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. Swann v. Charlotte-Mecklenburg School Board of Education, *supra;* Green v. County School Board, 391 U.S.430, 88 S.Ct. 1689, 20 L.Ed.2d 716 [1968]; Bradley v. Milliken, *supra,* 345 F.Supp. at 937 and cases cited therein.

12. The remedial obligation rests with school authorities, but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, this court has broad equity power, and the duty to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned, and implemented as soon as possible. Swann v. Charlotte-Mecklenburg School Board of Education, *supra;* Carter v. West Feliciana School Bd., 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 [1970], same 396 U.S. 226, 227-228, 90 S.Ct. 467, 24 L.Ed.2d

382 [1969]; Bradley v. Milliken, *supra*, 345 F.Supp. at 938; Acree v. County Bd. of Education of Richmond Co., Ga., 458 F.2d 486 [5th Cir. 1972]; Pennsylvania Ass'n Retard. Child. v. Commonwealth of Pa., 334 F.Supp. 1257, 1266-1267 [E.D.Pa. 1971]; Fed.R.Civ.P. 52.

Order

And now, this 15th day of May, 1973, this Court having found that the County and State Boards acted contrary to the Constitution in adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into a single school district, it is hereby ordered and directed that:

(1) Defendants Commonwealth of Pennsylvania, The Pennsylvania State Board of Education, and W. Deming Lewis shall prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation for the central eastern area of Allegheny County to remedy the Constitutional violations found by this Court, which plan shall become final unless objected to by plaintiffs within 20 days after it is filed with the Court.

(2) Such plan shall meet following standards:

(a) the plan shall alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or near-by school districts.

(b) the plan shall be an educationally sound and practical plan of desegregation that promises now and hereafter to achieve the greatest possible degree of desegregation within the public schools of Allegheny County, taking into account the practicalities of the situation.

(c) the plan shall set forth the dates on which it shall go into effect, which dates shall be set as early as possible.

(3) Defendants Allegheny Intermediate Unit Board of School Directors, and Edward Hallenberg, its President, shall assist in the preparation of the plan in all respects within their special area of responsibility and to the fullest extent render the benefits of their expertise and knowledge of local facilities and resources so that the terms of this order may be carried out by the other Defendants.

(4) In preparing said desegregation plan it is anticipated that defendants will consider the factor of racial balance along with other educationally relevant criteria and that the plan submitted by defendants will be consistent with the policies of the Department of Public Instruction and Human Relations of Pennsylvania relating to school integration.

(5) Defendants shall give each school district whose boundaries may be altered by said school desegregation plan the opportunity to be heard prior to the adoption of a final plan.

(6) Until said school desegregation plan is finally approved by this Court, defendants are hereby enjoined and restrained from taking any action, directly or indirectly, that may in any way limit or otherwise affect any school assignment options that could possibly be considered or proposed by any parties to this action.

(7) This Court expressly retains complete and continuing jurisdiction to modify this final judgment and decree on its own motion or on motion of any party.

(8) This judgment and decree shall take effect immediately.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-538

DOROTHY HOOTS *et al.*,

v.

COMMONWEALTH OF PENNSYLVANIA *et al.*,

(CAPTION ABBREVIATED IN PRINTING)

OPINION

WEBER, C.J.
March 5, 1981

In 1973, this court found the General Braddock Area School District was a racially segregated district, created by the Commonwealth of Pennsylvania through its state and county Boards. Since that time, the court has heard testimony on several plans designed to desegregate the school system. At this stage, however, no further decisions on an appropriate plan can be made until it is determined which, if any, of the surrounding school districts can be included in any remedy within the guidelines of *Milliken* v. *Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). (*Milliken I*).

This was a matter set down for briefing and argument in August 1980 at the time of extensive hearings on this case. Our consideration and determination of this matter was interrupted and delayed by the abrupt change of position of plaintiffs' counsel, the interlocutory appeal which followed, and the five months' wait until the decision of the Court of Appeals, 3rd Cir., 639 F.2d 972, on this matter. Now that it is back with this court time was required to refresh recollection and review files before determining what might have been determined in September 1980. The court has relied on the arguments

made at that time and the extensive briefs filed at various points to arrive at the following conclusions.

Milliken held that a multi-district remedy was impermissible where the court has found a condition of segregation in only one district, unless it can be shown that the violation was caused by the acts of adjacent school districts.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, [v. *Charlotte-Mecklenburg Bd. of Ed.*] 402 U.S., [1] at 16 [91 S.Ct. 1267, at 1276, 28 L.Ed.2d 554]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.
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> *Milliken* v. *Bradley*, *supra*, at p. 744-45, 94 S.Ct. at 3126-27.

Before any proposed remedy can be fully considered we must review the facts of this case to determine whether an interdistrict remedy is appropriate here or whether any remedy imposed must be limited in its application to less than all of the districts joined herein. It begins to appear that there is no possible remedy that would effectively desegregate General Braddock that does not include many neighboring school districts. Because an interdistrict remedy may be the only remedy available to the court, we must review the facts of this case to determine whether such a remedy is appropriate here.

Furthermore, from the testimony produced at the hearings on the tuition plan it becomes more evident that an interdistrict remedy that does not include a broad area would be futile judicial exercise because limiting the remedy to only some of the districts, or the adjacent districts, would enlarge the size of the segregated district because the school population in some nearby districts approaches the degree of minority concentration existing in General Braddock Area School District. The focus of the infection would metastasize; a super General Braddock Area School District would be created with the same problem. The same consideration required that we reject Plan 22-W because the inclusion of Wilkinsburg completely upset the racial balance sought.

The General Braddock Area School District was created as a result of a reorganization of school districts initiated by the Commonwealth and accomplished by three specific pieces of legislation.

Prior to 1961, the Pennsylvania Public School Code of 1949, 24 P.S. § 2-251 allowed school districts to merge voluntarily. Thereafter there was a series of statutes compelling mergers. The Commonwealth first passed the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. § 2-281 et seq. [Act 561] to effectuate the state's goal of achieving comprehensive programs of education through larger school districts. Although the Act recognized voluntary merger of districts this was the first Act to set up a compulsory system of reorganization and merger and provided that each county board of school directors should prepare a plan of organization of administrative units for the county for review by the State Council of Education by Jan. 1, 1963. 24 P.S. §§ 2-282, 2-283. *State Board of Education* v. *Franklin Township School District*, 209 Pa.Super. 410, 228 A.2d 221, 223 (1967). Once submitted by the county board, the State Board would review the plan for approval taking into consideration certain environmental criteria, including topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units, and potential population changes. 24 P.S. § 2-281. After review, the State Board could reject or rewrite those plans that it did not consider "wise in the best interests of the educational system of the Commonwealth." It was further provided specifically that the

State Board could not approve any plan for an administrative unit which contained a student population of less than 4,000 pupils unless the above criteria were considered and the Board found that the situation necessitated the lower student population. In no event, however, was the State Board to approve any administrative unit with less than 2,500 pupils. 24 P.S. § 2-283. Once approved, the administrative units were to become operative in 1965.

At the time Act 561 was passed, the following school districts operated in central eastern Allegheny County: Wilmerding, North Versailles, Gateway, Turtle Creek, East Pittsburgh, Braddock, North Braddock, Rankin, Braddock Hills, Swissvale, Edgewood, Wilkens, and Forest Hills.[1] On May 15, 1962, before the County Board had established a plan for reorganization, Wilkens and Forest Hills areas voted to voluntarily merge into a single district known as Churchill. Churchill was later approved by the State Board on June 25, 1962. Allegheny County did submit a reorganization plan under Act 561 which was approved by the State Board, but before the effective date of 1965.

Act 299 (Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290 et seq.) was passed to replace Act 561. Act 299 contained the same basic provisions as Act 561, but included a three-tiered appeals process for "aggrieved" school districts. The criteria for reorganization and the minimum 4,000 pupil population provision were both carried over. Act 299, however, expressly reserved to the State and County Boards the right to reconsider its approval of previously joined districts (ones formed by voluntary merger prior to Act 299) and to be remerged into even different and larger districts. 24 P.S. § 2-292. Therefore, any administrative units that had been approved under Act 561 would still come under the authority of Act 299 and the County was effectively operating from a clean slate.

Although aware of strenuous objections to the proposed plan submitted by the County Board, at its meeting on September 6, 1964, the State Board approved the following administrative units: Unit 14

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[1] Several of these districts did not maintain their own high schools but utilized a tuition plan with neighboring districts.

(Gateway); Unit 15 (Wilkens and Forest Hills combining to form Churchill); Unit 18 (Wilmerding and North Versailles combining to form East Allegheny) and Unit 38 (Braddock Hills, Edgewood, and Swissvale). As a result, Units 14, 15 and 18 all became operative on July 1, 1966. Unit 38 did not because Edgewood took an appeal.

Along with Unit 38, this left unapproved the racially unbalanced and controversial proposed Unit 16, which consisted of Braddock, North Braddock, Rankin, Turtle Creek, and East Pittsburgh. Since the surrounding municipalities with approved school districts were now operative, they were no longer available under any reorganization plans. This left the State few options with which to deal with Unit 16. The state chose to create new Unit 16, consisting of Braddock, North Braddock and Rankin (with a close to 40% black student population as of 1967), and new Unit 42, consisting of Turtle Creek and East Pittsburgh (with a 1.3% black student population as of 1967).

In 1968, the legislature passed Act 150 (Act of July 8, 1968, P.L. 299. No. 150, 24 P.S. § 2400.1 et seq.) which superseded Act 299. This Act was simply a continuation of Act 299 and contained the same basic provisions as Act 299, except for modified appeals procedure. Act 150 further provided that all districts that had been merged under Act 299 would not be forced to merge to form larger districts. Therefore, with nothing new to work with, the State approved Unit 16, now called General Braddock Area School District, and Unit 42, now known as Turtle Creek, as they had been proposed under Act 299. The only change of the County Board's plan that occurred under Act 150 was that the proposed Unit 38 (Edgewood, Braddock Hills and Swissvale) was split up into two smaller districts: Edgewood, with a student population of 928, 0% black, and Swissvale and Braddock Hills, now known as Swissvale, with a student population of 2,286, 10% black. This was done in spite of the statutory criteria for the size of districts.

These school districts went into effect on July 1, 1971 and this lawsuit was filed on June 9, 1971.

In an earlier opinion in this case, *Hoots* v. *Commonwealth of Pennsylvania*, 359 F.Supp. 807 (1973), this court made the following conclusion of law.

> 7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. (citations omitted).
>
> 359 F.Supp. 807, at 823.

This constitutional violation was accomplished by the State and County Board through the reorganization process completed through Acts 561, 299, and 150. This court found specifically that the County and State Boards maximized racial segregation in the public schools by creating a school district composed of Braddock, North Braddock and Rankin. At the time the state approved such a district, no other combination of school districts in the area would have created a district with as large a percentage of non-white enrollment. (Finding of Fact No. 51, *Hoots, supra* at 819). Furthermore, the plan of organization adopted by the County and State Boards pursuant to Act 150 failed to meet many of the essential requirements of that Act and recognized educational standards. Act 150 was not met in several ways, the most obvious of which is the disregard of the 4,000 pupil population requirement (unless a smaller district was required) by combining Turtle Creek and East Pittsburgh with a population of only 1,898, by combining Braddock Hills and Swissvale with an enrollment of only 1,925, and by permitting Edgewood to stand alone with an enrollment of only 928. (Findings of Fact, No. 52. *Hoots, supra*, at 819).

The court found that the State and County Boards knew or should have known that they were creating a racially segregated school district. (Finding of Fact No. 50, *Hoots, supra*, at 818.) This court also found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. (Finding of Fact No. 39, *Hoots, supra*, at 816.) At the time that General Braddock Area School District was approved by the State Board, alternatives to

a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with Act 150. In view of the availability of these alternatives, the decision of the County and State Boards to create General Braddock Area School District was contrary to Act 150 and the standards set forth therein. (Findings of Fact 53 and 54, *Hoots, supra,* at 820).

On the basis of all the facts, this court concluded that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. (Finding of Fact No. 58, *Hoots, supra,* at 820). Furthermore, this court found that "the County and State Boards devised this plan of organization of administrative units which comprised Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin." (Finding of Fact No. 59, *Hoots, supra,* at 821.) Finally, the record contained no evidence showing that the school district boundaries established in the plan of organization of administrative units are rationally related to any legitimate purpose and the court found that those boundaries did not promote any valid state interest. (Finding of Fact No. 61, *Hoots, supra,* at 821.)

On the basis of the above history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150 and on the Findings of Fact of this court, particularly those laid out above, the court holds that a multi-district remedy is appropriate and permissible in this case. General Braddock Area School District was created as a result of an inter-district violation conducted by the state during the reorganization process which included the redrawing of school district boundaries in that part of Allegheny County. *Milliken I* holds that "an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation." This case clearly falls within *Milliken I* guidelines for an interdistrict remedy, since racially discriminating acts of the state have been a substantial cause of interdistrict segregation.

The neighboring school districts that argue against an interdistrict remedy base their arguments on the ground that this court has made no finding that they had any involvement in the reorganization process which would enable the court to apply any remedy to them. They claim that since they are not guilty of any specific discriminatory actions they cannot be implied in a multidistrict remedy.

A multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts. *Morrilton School District No. 32* v. *United States*, 606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980); *Evans* v. *Buchanan*, 416 F.Supp. 328 (D.Del. 1976), *aff'd* 555 F.2d 373 (3d Cir. 1977); *United States* v. *Board of School Commissioners of the City of Indianapolis*, 541 F.2d 1211 (7th Cir. 1976).

In the *Morrilton* case, the court found that the school district lines in Conway County followed a discriminatory pattern and ordered an interdistrict remedy. Some of the surrounding districts that would be effected by the remedy argued that since there was no evidence implicating them in a direct way, the court had no authority to order them to remedy the state's wrong. The court found this argument to be without merit since the effects of the unconstitutional state action are felt in both districts. The court went on to quote *United States* v. *Board of School Commissioners of City of Indianapolis*, 573 F.2d 400, 410 (7th Cir. 1978), *cert. denied*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978):

> [S]chool officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper* v. *Aaron*, 358 U.S. 1, 15-17, 78 S.Ct. 1401, [1408-09] 3 L.Ed.2d 5 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation. 606 F.2d at 228-229.

The several opinions written in the Wilmington case, *Evans* v. *Buchanan*, *supra*, also support an interdistrict remedy in a case whose facts are similar to our own. The State of Delaware had set out a plan for reorganization and consolidation, which excluded the school district of Wilmington by a provision which limited the maximum pupil enrollment to 12,000. Since Wilmington already had an enrollment of over 15,000, they were not considered for consolidation with any of the surrounding school districts. Since their nonwhite population was already at 66%, this had the effect of perpetuating and continuing segregation in the Wilmington schools.

The court in *Evans* found that the state had violated the constitution by acting in a manner which was a substantial and proximate cause of the existing disparity in racial enrollments in the districts of that area. They ordered a multidistrict remedy and the surrounding districts complained that they had committed no constitutional violation and should not be included in such a remedy. The court found this defense to be inadequate where the local boards are creatures of the state that had committed the violation.

> The fact that birth rates, or population shifts, or other factors also contributed to a degree will not relieve the State from its obligation to desegregate. The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for the acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities, but neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.
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> *Evans*, supra, at 339-340.

The case presently before this court, as in the cases cited above, calls for an interdistrict remedy. The State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the

> suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.
>
> *Evans*, supra, at 340.

Neither are the surrounding districts innocent in the reorganization plan which created General Braddock. This court found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. *Hoots*, supra. Finding of Fact No. 39.

Some of the school districts also claim a particular exclusive status, allegedly given them by the state, which would exclude them from being a part of any multidistrict remedy. Churchill, and East Allegheny were approved as school districts under Act 299. When that Act was superceded by Act 150, districts approved under Act 299 were exempted from Act 150. Churchill and East Allegheny claim they were granted "grandfather status" and therefore were not implicated in the creation of General Braddock which occurred under Act 150. Edgewood claims that because its boundaries preexisted all mergers, they were never involved in any redistricting which led to the creation of any segregated district.

This argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561. Furthermore, the very elimination from consideration for merger with those districts was itself a contributing factor to the creation of a segregated school district since all the districts with a lower black student population were now excluded from any plan, leaving General Braddock Area School District in an isolated position.

Churchill argues exclusion from a remedy even further in that they had begun their voluntary merger plans back in the 1950's, before Act 561 and the state reorganization plan. It is irrelevant, however, when their current boundaries were first established. The actual vote to merge did not occur until after the passage of Act 561. The state at all times under Act 561 and Act 299 had expressly retained the power to force further merger with districts that had previously voluntarily merged. The fact that the state chose not to disrupt the new district of

Churchill does not mean that the State could not have ordered them to merge again with Braddock Hills. Furthermore, it was the refusal to force such a merger, which was within the state's power, which contributed to the isolation of General Braddock.

Finally, the alleged "grandfather status" granted by Act 150 cannot eliminate any of the school districts from a future remedial plan of this court or the State. School districts are the creation and instrumentalities of the state and have no vested rights in their boundaries. In a case challenging the ability of the state to require merger under Act 299, the Pennsylvania Supreme Court held that the legislature reserves its powers to alter school laws in all contracts made by school districts. The court found that Act 299 could alter any mergers completed under prior acts since the Public School Code of 1949 did not intend to create vested rights but merely authorized the formation of school districts which would exist until changed by future legislative direction.

> The continued ability to alter the organization of the school system throughout the Commonwealth is a prerequisite to the fulfillment of the Legislature's constitutional duty to provide for the maintenance of a thorough and efficient system of public schools.
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> * * * * * * *
>
> The jointure agreement involved here was made pursuant to the authority given to school districts to enter into such agreements with the concomitant condition inherent in such legislative authority that actions taken pursuant thereto are subject to later change by the Legislature. As was pointed out in *Dodge* v. *Bd. of Education*, 302 U.S. 74, 79, 58 S.Ct. 98, 100 [82 L.Ed. 57] (1937), 'the presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise.'
>
> *Chartiers Valley Joint Schools* v. *Allegheny County Board*, 418 Pa. 520, 528-29, 211 A.2d 487 (1965).

School districts have no vested rights in their boundaries and they can be altered by the state whenever necessary. When the state has committed a constitutional violation in the use of its power, school district lines can be redrawn by the court to remedy that violation.

Edgewood also claims a sort of special status exempting it from any remedial plan since the Pennsylvania Supreme Court upheld its right to stand alone as a school district, despite its obvious non-compliance with the student population requirements. *Edgewood Borough School District Appeal*, 445 Pa. 343, 285 A.2d 880 (1971). That case, however, did not specifically address the propriety of or the motivation for letting Edgewood stand alone. It did not address the segregative effect of that action at all. That case was decided on a finding that the state had not abused its discretion in approving such a school district. The court refused to interfere with administrative decisions.

This court, however, must interfere with administrative decisions which are made by the state during the course of a constitutional violation.

On the basis of the foregoing this court holds that the following school districts may be included in any remedial plan to be considered by this court: Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood, and Gateway.

Two other school districts have been added as parties to consider the nature of the remedy, West Mifflin and Steel Valley. Both these school districts are located across the Monongahela River from the others in this area of eastern central Allegheny County. They were never considered in prior merger plans. The evidence shows that there is only one bridge carrying heavy traffic connecting these two school districts with the General Braddock area. This factor would make any consolidation with West Mifflin or Steel Valley highly impractical and they are, therefore, not to be included in any remedial plan before this court. Furthermore, the evidence suggests that as to Steel Valley, the present high degree of black school attendance in that district would only spread the area of segregation, and in West Mifflin the black school population in the most adjacent school facilities shows the same pattern. Furthermore, neither Steel Valley nor West Mifflin were involved in the jointure, consolidation or merger of the school districts which eventually led to the creation of the General Braddock Area School District.

Order

AND NOW, this 5th day of March, 1981, IT IS ORDERED THAT further consideration of remedial plans shall be governed by the above Opinion, and the motions to dismiss of the school districts of Churchill, Turtle Creek, Edgewood, East Allegheny and Gateway are DENIED. The motions to dismiss of the school districts of Steel Valley and West Mifflin are GRANTED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-538

DOROTHY HOOTS *et al.*,

v.

COMMONWEALTH OF PENNSYLVANIA *et al.*,

(CAPTION ABBREVIATED IN PRINTING)

OPINION

WEBER, C.J.
April 28, 1981

We begin bearing in mind a profound observation of Henry Louis Mencken that every difficult problem always has a simple solution and that solution is always wrong. There is no simple solution here and we have searched all of those offered. Any solution is involved with high emotional reactions to the extent that calm discussion is rarely possible in the presence of as many as twelve sets of counsel, mostly representing diverse and possibly irreconcilable interests.

The history of this case has been recited too often in the opinions of this court and reviewing courts to justify any repetition here. It has now always been discussed accurately. The description of the plaintiffs as parents of children in the General Braddock Area School District, of the plight of the Hoots, Knight and Smith children was pure fancy. Mrs. Hoots has not been a resident of this District since before the very first hearings; nine of Mrs. Knight's children graduated from Braddock High School before the reorganization, and Mrs. Knight has not resided in the district since 1977. Mrs. Smith has remained a resident of General Braddock Area School District and an employee of plaintiffs' counsel, but her children are enrolled in parochial schools. Because of these facts, plaintiffs have moved for the substitution of new parties plaintiff, although the caption still bears the Hoots name for identifying purposes.

Nor is the picture of the black children of General Braddock sitting on the steps of the courthouse waiting for justice accurate. It would be more accurate to state that they are part of a group, both black and white, that are picketing the court to stop any plan that involves the closing of Scott High School. They have so testified, they have filed petitions with the court, and have indulged in a letter writing campaign. This feeling was particularly strong when Scott High School became the State Champion in the basketball competition.

Nevertheless, there is a clear violation of constitutional rights, and there are now proper parties plaintiff before the court; regardless of the size of the group they have a right to be remedied.

Following our rejection of Plan A in 1977 for the reasons set forth in the opinion and the appeal therefrom, this court proceeded on the motion of the plaintiffs to order the Commonwealth to prepare a tuition voucher plan. Additional neighboring school districts were added as defendants for the purpose of devising a remedy. The Commonwealth required more time than was originally allowed, and finally filed its detailed tuition plan on May 15, 1980. The school districts involved filed objections by June 16, 1980, and hearings began on July 14, 1980 and continued until July 30, 1980. In the midst of the hearings, which the court had limited solely to the merits of the tuition plan, plaintiffs took an abrupt change of position and opposed the plan, and presented testimony in opposition. In the midst of the hearings plaintiffs presented a motion calling for the immediate rejection of the tuition plan and for an injunctive order requiring the Commonwealth to prepare a merger or consolidation plan. This was denied because the court had not yet made any decision on the requested tuition plan and an immediate appeal by plaintiffs followed.

In the meantime, two additional plans were submitted by parties, an upgrade plan by General Braddock, and a metropolitan merger plan by the Commonwealth, both of which were solely preliminary proposals without a detailed workup. The Commonwealth later withdrew its metropolitan plan from consideration. No plan that we had considered up to that time achieved a consensus of approval by the parties; the tuition plan was the least strenuously opposed because it

left the individual administrative units intact, including General Braddock itself, and because it proposed distributing the General Braddock students over a very wide area and among many districts. Nevertheless, it consigned General Braddock students to a second class status, that of tolerated guests in a foreign school district, and it deprived their parents of a voice in the control of the school district that was educating their children.

In August 1980 we were prepared to continue hearings on other plans but all of this was interrupted by the pendency of the appeal.

Upon the return of the mandate on January 27, 1981, we immediately convened the counsel for consideration of further action. We rejected the upgrade plan which did essentially nothing to achieve desegregation and also we determined the *Milliken* v. *Bradley* issue as it applied to certain of the school districts joined as defendants for the purpose of relief. We dismissed two of the previously joined school districts because their further involvement was considered unnecessary. We determined that the only appropriate remedy in this situation must be a multi-district merger of several school districts into a single district. The plaintiffs' counsel informed us through certain motions for discovery, that they had engaged professional expert services and would submit a plan. On March 24, 1981, the plaintiffs for the first time proposed their own remedy. This called for a plan of consolidation of five school districts. We set the matter down for hearings on April 20, 1981.

We strictly limited this hearing to the question of the geographical boundaries of the proposed district and the identity of the districts to be included. At this point seven school districts remained as defendants for the purpose of constructing a remedy. We limited the plaintiffs to one day of testimony limited solely to this issue, and gave all defendants two days for cross-examination and presentation of direct testimony. The defendants were allowed to divide their time among themselves but did not choose to do so. Only four districts desired to present any direct testimony and for the most part only these districts undertook cross-examination.

General Braddock Area School District announced at the opening of the hearing that they joined with the plaintiffs' motion to approve the five district plan.

We barred all testimony as to the administration of the plan, its implementation, pupil assignments, the further use or discontinuance of school facilities, both because we believed that the essential primary question for our consideration was the make-up of the new district, and also because we believe that the organization and planning of the educational system in the New School District was a matter for determination by the Pennsylvania Department of Public Instruction, the Allegheny County Intermediate Unit, and the representations of the New School District.

We, therefore proceed to our determination of the New School District.

The Composition Of The New District.

The Court finds that a New School District composed of the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation of the General Braddock Area School District and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation. The Court bases this conclusion on the following evidence developed in the record:

(1) It would produce a district with a school population 83% white and 17% minority (mostly black), within a general range of recognized desegregation guidelines and comparable to the population distribution over a wide area of Allegheny County.

(2) The pattern of desegregation established is likely to remain stable.

(3) All of the districts included are contiguous to each other, three of the districts border General Braddock, and the remaining district, Edgewood, borders one and almost borders another.

(4) The area of the New District is moderate in size (13.5 sq. miles) as compared to the average size of Allegheny County Districts (15 sq. miles).

(5) The district is roughly circular in configuration, lending itself to increased administrative and transportation efficiencies.

(6) All points in the district are within 2.5 miles radius of its center, and the greatest diameter from one edge of the district to the other is less than 5 miles.

(7) Student population density of the New District would be 821 per square mile, a high density compared to the 275 per square mile density of the average Allegheny County School District (excluding the City of Pittsburgh).

(8) Student population of the New District would be 9,132 in 1981, which exceeds the minimum of 4,000 students mandated for merged districts under the statutory and regulatory guidelines of the Commonwealth of Pennsylvania.

(9) Student enrollment in all of the merged districts has been declining at a rate exceeding 35% in the past ten years, and from the student population figures in grades from kindergarten to 12th grade may be expected to decline at a comparable rate in the next eight years, all of which indicates a need for consolidation to achieve educational efficiency and economy.

(10) All of the merged districts have excess capacity, in most cases substantial, at all instructional levels, making the excess capacity for the New District 40%. This will increase as the student population continues to decline. This excess capacity could be greatly reduced by the merging of these districts, the merging of student population, the discontinuance of old buildings requiring extensive repairs, allowing for a better organized comprehensive educational program without additional cost, and the possibility of very substantial savings in costs, as well as achieving desegregation.

(11) The New District will be strongly interconnected by available transportation arteries, and the relatively short distances between most parts of the district will minimize the time and mileage involved in any additional transportation needed.

(12) The existing transportation facilities of the merged districts, should be adequate to serve the transportation needs of the New District.

(13) Inasmuch as a substantial number of public school students in the present district are bussed, and because of the limited

distances in the New District, it is not contemplated that any large increase in the total mileage or number of students transported will result from the consolidation.

(14) The proposed New District will be financially viable, having a higher tax base per student than the state average, and higher than some of the present districts included.

Districts Excluded

We have previously dismissed from consideration of inclusion in the remedial district the districts of Steel Valley and West Mifflin because the distances involved are too great and the transportation bottleneck of a single highway bridge across the Monongahela River is too severe. Furthermore, because Steel Valley's student population shows a high ratio of minority students, its inclusion would not advance the desegregation of General Braddock. The size and distances of the West Mifflin District, the distant location of some of its facilities, and the high percentage of minority student population in the schools nearest the New District do not make it amenable in a district designed to achieve desegregation of the General Braddock district.

At the time of the April 1981 hearings, Gateway district and East Allegheny district remained as parties. They were not included in the Motion of Plaintiffs to create a five (5) disrict consolidation but their motions for dismissal were opposed. At the hearing, testimony was offered as to the reasons for their exclusion and no evidence supporting reasons for their inclusion was presented. In general, neither of these districts should be included. Their large geographical area, the distances of their facilities from the facilities in the New District, and the acute transportation bottlenecks between these districts and the New District made their inclusion highly undesirable. At the close of the hearings their motions for dismissal were granted.

Individual Districts To Be Included.

This left five districts to be considered. The reasons for the inclusion of each individual district in the New District are:

(1) ***General Braddock:*** This district must be included in any remedy because its intentional creation as a racially identifiable black

school district constituted the constitutional violation found in this case. Its 63% black student population in a larger area where the surrounding districts vary from less than 1% to a maximum of 13% black makes it mandatory for inclusion. It has continued serious financial problems that make its future as a viable district uncertain.

(2) ***Turtle Creek*** is included because it is contiguous to the General Braddock area, and also contiguous to Churchill which is also included in the New District. It is racially identifiable as a white school district (98%), it is small in area (1.37 miles), and has a high density of pupils per square mile (920), it has significant unused building capacity, particularly in its high school, and has experienced dropping enrollment and faces a continuing decline. Its present 1,200 student population in the face of a state standard of 4,000 students required for an adequate educational program renders its future as a viable independent school district cloudy. It has adequate transportational connection with the rest of the New District. It has close community business and occupation ties with the General Braddock Area District and also with the Churchill Area. It faces the same economic problems as the General Braddock district.

(3) ***Churchill*** is included because it is contiguous to General Braddock, as well as contiguous to Turtle Creek, Swissvale, and almost if not actually contiguous to Edgewood. It is identifiable as a 99.2% white school district. It has excess capacity in its facilities and a declining enrollment. Its geographical position puts it in the heart of the New District, and its exclusion from the compact formation of the New Distict would make all of the considerations of geographical contiguity and compactness of the New District meaningless. Its economic strength would add financial stability to the new district.

(4) ***Swissvale*** is included because it is contiguous to the General Braddock Area District, as well as contiguous to Churchill and Edgewood in the New District, it is small in geographic area but with a high density of pupils per square mile (771), it is small in student population (1,757), below the minimum state standard requiring consolidation, and its student population. It has many connecting arteries of transportation with the rest of the New District. Its exclusion would result in a large vacuum between the other areas of the

New District because of its central position in the configuration and its nexus of transportation arteries connecting other parties of the New District.

(5) ***Edgewood*** is included because it is identifiable as a white school district (98%) in a general area the composition of which is 17% black, and where the adjoining district, Swissvale is 13% black; its very small geographic size, (1/2 sq. mile), its high student population density (920 pupils per square mile), and its very low student population (731), which has declined and will continue to decline, and its substantial underutilization of facilities. It is close to many other schools in the New District, and has ready transportation access to the other areas included in the consolidation. We recognize that Edgewood was granted an exemption from the 4,000 minimum student population requirement after much litigation, but its student population has continued to decline. It is highly commendable that this district has been able to attract 100 tuition students from Pittsburgh and other districts to help fill the underutilized facilities, and that it is able to receive $1,000 or $1,200 per tuition student in this process, bringing substantial additional revenue to the district. However, it is possible for Edgewood to educate these additional students at a figure much less than the average cost of education per pupil because of the economic law of marginal cost, no increase of operating costs is involved in the utilization of the empty of classroom seats. However, in so doing Edgewood has entered the business of private education and using the profit therefrom to help finance the education of its own residents. This is contrary to the Commonwealth's school district reorganization policy. Edgewood's inclusion rounds out the compact shape of the district, and adds financial stability to the New District.

All of these districts are properly subject to inclusion in the remedy of desegregation of the General Braddock Area School District because of their involvement in the violations which led to the creation of the General Braddock Area School District as set forth in our Opinion of March 5, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-538

DOROTHY HOOTS, *et al.*,

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Defendants

Order

And now, this 28th day of April, 1981, it is hereby ORDERED that the public schools in the districts named herein in central eastern Allegheny County, Pennsylvania, shall be desegregated, effective in the beginning of the first semester of the school year, 1981-1982, in accordance with the following terms and conditions:

(1) As of the date of this Order the following school districts in Allegheny County, Pennsylvania, shall cease to exist as separate school districts and shall be consolidated and merged into a single unitary school district, hereinafter referred to as the "New School District";

Churchill Area School District

Edgewood School District

General Braddock Area School District

Swissvale Area School District

Turtle Creek Area School District

(2) The New School District created by this Order shall constitute and be deemed established as a school district and shall be belong to the class to which it is entitled as provided by law.

(3) All school directors of the component school districts forming The New School District shall serve out the terms of office for which they were elected. No vacancies occurring in such positions after the date of establishment shall be filled.

(4) On or before the 15th day of May, 1981, such incumbent school directors of the component school districts shall be called into convention by the County Superintendent of Schools and shall select by majority vote an Interim Operating Committee composed of nine (9) incumbent school directors. In selecting the Interim Operating Committee the incumbent school directors shall select no more than two (2) incumbent school directors from any single former district. The decision of the convention in selecting the Interim Operating Committee shall be final. Three (3) of the members of the Interim Operating Committee shall be selected for a term expiring on the first Monday of December, 1981, three (3) for a term expiring on the first Monday of December, 1983, and three (3) for a term expiring on the first Monday of December, 1985. In the event that an incumbent director is selected for a term on the Interim Operating Committee which would expire later than the term for which he was elected as a School Director, he shall serve only until the end of his term for which he was elected as School Director. At the municipal elections held in November, 1981, and at each municipal election thereafter School Directors shall be elected for six (6) year terms and shall take the place of the appointed members of the Board of School Directors of the newly established School District as their terms expire. The members of the Interim Operating Committee shall become and shall serve as the Board of School Directors of the School District on and after the date of its establishment as herein provided.

(5) The incumbent School Directors of the component former school district not selected for membership on the Interim Operating Committee shall serve in an advisory capacity to the Interim Operating Committee and to the Board of School Directors of the newly established School District. Such incumbent School Directors may attend meetings and participate in discussion of the Interim Operating Committee and Board of School Directors but shall have no vote.

(6) The Interim Operating Committee of the New School District shall develop a plan to divide the New School District into

nine (9) regions. The boundaries of the regions shall be fixed and established in such manner that the population of each region shall be as nearly equal as possible and shall be compatible with the boundaries of election districts. Such plan for the division of the school districts shall be submitted for approval to the Court of Common Pleas of Allegheny County. If approved by such court the Clerk thereof shall be immediately certify the regional boundaries contained therein to the County Board of Elections. One (1) School Director who resides in each region shall be elected or appointed by and from each region and at all times each region shall be represented by a Director elected or appointed as herein provided from that region.

(7) The Interim Operating Committee shall have the power and its duties shall be to meet, prepare and adopt a budget, levy and assess taxes and perform all acts and functions necessary to enable the New School District to function properly from and after the date of organization of the Interim Operating Committee.

(8) The Interim Operating Committee shall have the power to fill vacancies should a vacancy in its membership arise due to death, resignation or otherwise provided, however, that the vacancy shall first be filled by the selection of an incumbent School Director elected by one of the component former school districts.

(9) The Interim Operating Committee shall have the power and its duties shall be to propose a name for the New School District. The name proposed shall be reported to the Department of Public Instruction which shall review the proposed name and approve it if it is not a duplication of a name previously approved by the Department of Public Instruction. When it approves a name, the Department of Public Instruction shall issue a certificate stating that the approved name has been registered as the official designation of the School District.

(10) The component school districts shall continue under the governance of their respective directors until June 30, 1981.

(11) All operating obligations of any component former school district contracted for current operating expenses until June

30, 1981 shall continue to be an obligation of the taxable property within such former component school district.

(12) On or before June 1, 1981, the representatives of the Pennsylvania Department of Education and the Allegheny County Intermediate Unit shall convene a meeting of the Interim Operating Committee to:

(i) assume the governance of the New School District;

(ii) organize the consolidation of the five former school districts;

(iii) establish the administration and provide for the financing of the New School District, and

(iv) take all actions necessary to prepare for the implementation of a plan of desegregation as set forth herein.

(13) The Secretary of the Pennsylvania Department of Public Instruction, or his designate, and the Allegheny County Intermediate Unit shall meet with the Interim Operating Committee of the New School District on or before the 15th day of June, 1981, to design a plan of desegregation and provide for its implementation with the beginning of the 1981-82 school year, and shall continue such planning until such plan is fully operational within the New School District.

(14) The plan of desegregation shall be designed and implemented in such a manner as to achieve and satisfy the greatest possible degree of actual desegregation, including desegregation of student enrollment, attendance, administration, faculty, staff, facilities, programs and activities. The plan shall be equitable in every respect and designed to achieve an equal sharing of the burden of desegregation between black and white students, parents and communities. The plan shall be designed not only to eliminate the effects of past discrimination but to the greatest extent possible, to prevent like discrimination in the future years.

(15) All of the provisions of the act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949," relating to school districts shall apply to this New School District.

(16) It shall be the primary responsibility of the Secretary of the Pennsylvania Department of Public Instruction, or his designate,

to assure that a plan of desegregation is designed and implemented in accordance with the timetable set forth herein. In order to execute this responsibility the Secretary of Pennsylvania Department of Public Instruction, or his designate, may take any action, consistent with this order and opinion, which it deems necessary to achieve the objectives set forth in this order.

(17) This court shall retain continuing jurisdiction over this action to oversee the planning and implementation of a program of desegregation; to enforce this order; and to enter such other orders as the court deem just and proper to effect a remedy.

/s/ GERALD J. WEBER
Gerald J. Weber
Chief United States District Judge

Amicus Brief

Office - Supreme Court, U.S.
FILED
JUN 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2030

In the Supreme Court of the United States

OCTOBER TERM, 1981

EDGEWOOD SCHOOL DISTRICT,
Petitioner,
vs.
DOROTHY HOOTS, et al.,
Respondents.

~~MOTION FOR LEAVE TO FILE THE ATTACHED~~ BRIEF OF THE BOROUGH OF EDGEWOOD, PENNSYLVANIA APPEARING, AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOW COMES the Borough of Edgewood through its solicitor and special counsel and moves this Honorable Court for leave to file its Brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED, this the 1st day of June, 1982.

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EDGEWOOD SCHOOL DISTRICT,
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INTEREST OF THE BOROUGH

The Borough of Edgewood is a small community in Western Pennsylvania, approximately one square mile in size with about 4,700 residents. The borough has been incorporated since 1888. Its coterminous school district has educated the borough's student age population since 1892. The borough, although old, has remained a strong and vibrant community to a large extent because of the existence of a high quality neighborhood school. Many families and their offspring have remained in or returned to the neighborhood because their children can walk to a school that traditionally sends more than three-fourths of its students to college. New families have regularly moved to Edgewood because of its quality school system. The borough files this brief because of the strong interrelationship between the borough and Edgewood School District.

REASONS FOR GRANTING THE WRIT

The district court with the circuit court affirming has in this case found a violation of the equal protection clause of the fourteenth amendment on the part of the State and County Boards without on record evidence to support that finding. The only evidence on the record that might tend to support a finding of illegal discrimination is evidence that officials could foresee that some school districts would be more heavily black than others and that application of the racially neutral standards for reorganization would result in differences in racial composition of neighboring districts. This Court has established that evidence of foreseeable consequences and disparate results, alone, does not set forth a violation of the equal protection clause. Since that is the only evidence of discrimination in this case, this Court should grant the writ and reverse the lower courts' finding of intentional segregation.

The circuit court also erred when it affirmed the district court's remedy that included Edgewood School District. There is no evidence on the record that Edgewood was involved in a constitutional violation. In addition there is no evidence that Edgewood pressured the State or County Boards to exclude it from merger with Braddock, Rankin or North Braddock districts; nor is there evidence that the State or County Boards independently decided to exclude Edgewood from merger with Braddock, Rankin or North Braddock for racial reasons. The state standards affirmatively required Edgewood's exclusion from any merger with Braddock, Rankin or North Braddock because Edgewood is not contiguous with any of those districts. Without evidence of Edgewood's involvement in a constitutional violation, either directly or vicariously through the State or County Boards, under remedial principles well-established by this Court, Edgewood must be excluded from the remedy in this case.

This Court should also grant certiorari in order to set forth the required evidentiary showing for a school district to be included in an interdistrict remedy. Some circuit courts have

insisted upon evidence of direct involvement in or benefit from a constitutional violation while other circuits have adopted more illusory requirements. The stricter standard should be adopted to set controllable limits on the district court's remedial authority in interdistrict school segregation cases.

I. The Circuit Court Failed To Fulfill Its Statutory Duty To Overturn The District Court's Clearly Erroneous Finding Of Intentional Discrimination.

This Court has established a rigorous standard for the proof of discriminatory or segregative intent necessary to establish a violation of the equal protection clause of the fourteenth amendment. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), this Court stated:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences.... It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part "because of," and not merely "in spite of," its adverse effects upon an indentifiable group.

The record in this case is barren of evidence which would support a finding that the decision-makers, the State and County Boards, formed General Braddock Area School District (GBASD) "because of" considerations of race. Rather, the evidence shows that race was not even considered when the various districts were approved. Edgewood School District's case is even clearer. The record is devoid of evidence of segregative intent on the part of Edgewood or the State to segregate Edgewood from Braddock, North Braddock or Rankin.

The third circuit set forth a list of the evidence before the district court which was said to support that court's finding of segregative intent. A review of this evidence, however, demonstrates that Respondents have failed to meet their burden of showing discriminatory purpose on the part of the State or County Boards or Edgewood School District.

The first piece of evidence relied upon by the circuit court was:

> a letter to the County Board in 1964 from a Mrs. Ryland, a resident of Turtle Creek, requesting the Board to shield the white children of Turtle Creek from "colored people [of] the kind that live in North Braddock, Braddock, and Rankin" (A 21) (refers to Joint Appendix of Edgewood and Swissvale).

This Court has established that statements by community constituents are not enough to show discriminatory intent on the part of the decision-makers. *City of Memphis v. Greene*, 101 S.Ct. 1584, 1594 n. 26 (1981). There must be, in addition, a finding that such statements actually influenced the decision-makers. In this case, there is no evidence to support a finding that this statement influenced the State or County Boards' decisions.

The following evidence relied upon by the circuit court also fails to meet the *Memphis* linkage-to-official-action-requirement.

> There was in-court testimony by a central Eastern area municipal official, Joseph D. Suley, admitting that he and his colleagues had pressured State and County Board members in the 1960's to insulate their municipalities (Braddock Hills, Turtle Creek and East Pittsburgh were mentioned by name) from merger with Braddock and Rankin because of "the black issue" and because of the "bitterness" felt by "whites" towards "blacks" in the area. (A 21-22)

As a former school board member of North Braddock School District, Mr. Suley's testimony reveals nothing more than the input that he made to the State and County Boards. It does not show that those Boards agreed or acted because of his statement. The State and County Boards' final decisions show that any pressure he may have tried to apply on behalf of North Braddock did not prevent the Boards from deciding to merge North Braddock with Braddock and Rankin. Furthermore, he

did not testify that any official from Edgewood pressured the State or County Boards to avoid a merger with GBASD on racial or any other grounds.

The testimony of the Respondent's expert witness was cited by the third circuit as evidence in support of the district court's finding:

> Dr. John Finger, plaintiffs' educational expert, testified that, in his professional opinion, it was possible to "infer from some of the [public] documents that . . . race, indeed, was taken into consideration" by public officials "in recreating school districts," and that those officials "exclude[d] Rankin and North [Braddock] and Braddock from consolidation with neighboring white districts "because they are black." (A 23-24)

From the record, Dr. Finger's full statement was as follows:

> Q. [by plaintiff's counsel]: On the basis of the testimony, exhibits and stipulations introduced into evidence in this case, are you able to give an opinion whether race or wealth were factors involved in the formation of the General Braddock Area School District?
>
> A. I believe that the best answer to that question would be—*I was going to say the best answer was no*, but then I *suppose* one *might* infer, from some of the documents that it was. *I assume*, from what the end result is, that race, indeed was taken into consideration and the people were trying to exclude Rankin and North Braddock and Rankin. *I guess this is just kind of a public assumption, but I don't know that I could particularly prove that, given this set of documents.* (emphasis added).
>
> The court: Well, I don't know if we are interested or not in the motive or anything like that, but is the end result that this was achieved?
>
> A. (the witness agreed). (237a-238a).

Dr. Finger's verbatim testimony reveals several things: he was reluctant to draw any conclusions from the public documents;

his observations are but an inference from the impact of the actions of the State and County Boards; and at most his testimony goes to the question of impact, not intent. It has been well-established by this Court that discriminatory impact alone is not enough to prove a violation of the equal protection clause. *Washington v. Davis*, 426 U.S. 229 (1976).

The circuit court drew further support from the following evidentiary finding:

> [T]he Boards' redistricting plan disregarded statutory authority and administrative reorganization standards, *e.g.*, the statutory 4000 pupil minimum guideline, the requirement that existing facilities be used where possible, the requirement of racial and cultural diversity, and the requirement that each district be capable of providing a comprehensive educational program (A 24).

Whether the state statutory standards were met by the State and County Boards' redistricting plan is an issue of state law. The *Erie* doctrine requires, therefore, that the federal courts look to decisions of the state courts to interpret the state law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). When an issue of state law has been conclusively determined by the state's highest court such a determination is binding on the federal courts. The federal courts may find that the state law, as interpreted by the state courts, violates the federal constitution and overturn the statute itself, but the federal courts cannot freely determine violations of state statutes when those issues have been resolved by the state courts.[1]

In *In re Edgewood Borough School District Appeal*, 445 Pa. 343, 285 A.2d 880 (1971), the Pennsylvania Supreme Court approved an administrative unit of the Edgewood School District alone. That court found that "the State Board considered the matter fully, fairly and carefully, and scrupulously fulfilled its statutory mandate to 'approve such plans as it deems wise in the best interests of the educational system of the Common-

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[1] *See Adderly v. Florida*, 385 U.S. 39, 46 (1966); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965); *Evans v. Abeny*, 396 U.S. 435 (1969).

wealth.'" 24 P.S. §2400.3. *Id.* at 352, 285 A.2d at 884. This issue should, therefore, be settled. The only issue open to the district court is whether the standards, as applied, violated the federal constitution, not whether the standards themselves were not met. It is noted, though, that the state reorganization standards require that "administrative units shall be planned as a contiguous geographic area." (319a). Since Edgewood is not contiguous with Braddock, Rankin or North Braddock, this standard affirmatively requires Edgewood's exclusion from combination with those districts.

The circuit court further relied on two pieces of evidence that are nothing more than hearsay, opinion and speculation and which also do not meet the *Memphis* linkage-to-official-action requirement. They are:

> 1) [A] 1964 brief by Braddock Hills officials to the County Board which attributed the Board's refusal to merge Churchill with any of its neighbors to political pressure from Churchill "based on politics, race, color or creed..." (A 23).
>
> 2) [A] letter to State and County Board members signed by Thomas A. Harper, a Braddock School Board member, and LaRue W. Frederick, the president of the area NAACP chapter, attributing neighboring municipalities' opposition to merger with Braddock and Rankin to fear of an "influx of a large number of Negro students into heretofore predominantly white units" and of the placement of "Negroes on the School Board [and in] professional and non-professional [staff positions] in the school system" (A 23).

Neither the circuit court nor the district court record set forth a single bit of evidentiary basis that supports the conclusions of the Braddock Hills brief and the letter from two citizens. This evidence lacks any probative value whatsoever.

The circuit court found further support for the district court's findings in a 1965 State Board staff report. The court inferred from the report that "a high non-white factor would be

a reason against a district's inclusion" in an administrative unit under the State and County Boards at that time (A 22). But, this staff report recommended the merger of Braddock, Rankin, North Braddock, Turtle Creek and East Pittsburgh, saying this group was "a natural" (310a). The report included several points in favor of the unit including: "6. The non-white population is not a factor in opposition to Turtle Creek since the percent of non-white is as follows: Braddock 55%, Rankin 51%, Braddock Hills 10%, East Pittsburgh 10%, North Braddock 10%, Turtle Creek none." (310a). In context this statement most likely meant that Turtle Creek was a desirable partner because its presence would positively integrate the unit. The Respondents have argued that the State should have engaged in such voluntary desegration. An initial attempt at doing so cannot then be evidence that it intended the opposite result.

The circuit court also looked to a statement which it attributed to a County Board member. This statement "call[ed] attention to the fact that the socio-economic factors involved in Turtle Creek—East Pittsburgh make it a homogeneous unit" (A 23). Yet, there was no such statement in the record. Instead, there was a report to the State Board summarizing a meeting with members of the County Board wherein such a statement was reported (308a). If this hearsay statement was in fact made, the court can only speculate as to what the Board member meant by the word "homogeneous." The speaker could have meant the same economic class as easily as race.

The final evidentiary matters cited by the circuit court were two statements which, if accurate, indicated that the speakers could foresee that the merger of Braddock, Rankin, and North Braddock would result in a unit that was more heavily black than the neighboring units. The circuit court noted:

> There was in evidence a statement made by County Board President, L. W. Early during hearings in 1968 on North Braddock's appeal that "we are painfully aware of [the fact] that...over the years surrounding school districts had sought to avoid a school merger which would include Braddock and Rankin in their school district and that it

> looked like North Braddock was going to be "left holding the bag" (A 23).

This evidence cited by the circuit court was a rewording of a stipulation of fact. The stipulation reads as follows:

> *North Braddock also testified* that over the years the surrounding school districts had sought to avoid a school merger which would include Braddock and Rankin in their school district and that it looked like North Braddock was going to be "left holding the bag." Mr. L. W. Early, President of the County Board, responded to this testimony with the remark "we are painfully aware of that." (701a). (emphasis added)

First, it is clear that Early did not make the full statement, attributed to him by the circuit court. Second, it is not clear what the pronoun "that" in Early's statement referred to. It could have meant that he was aware "that" the surrounding districts avoided merger with GBASD or it could have meant that he was aware "that" North Braddock "would be left holding the bag." Because of Braddock's well-known financial troubles, it is very possible that "left holding the bag" referred to financial concerns. Furthermore, its weight in supporting a finding of intent is limited because it is only a statement of foreseeability. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

The second statement that might indicate that a state official could foresee the impact of the formulation of GBASD was set forth by the circuit court:

> [A]n admission under oath by State Board Chairman Dr. Paul Christman that he approved the isolation of Braddock, Rankin and North Braddock from all its neighbors in 1965 despite his recogn[ition] of "a black-white factor there that was improperly dealt with...." He noted that the situation could "become even worse than it was at the time...in terms of [the] growth of percentage of blacks in those communities..." (A 22-23).

The statement was made on October 20, 1975 during a hearing in the remedial phase of the case. It was not part of the record when the district court found an equal protection violation. About the testimony the trial judge, Judge Weber, remarked: "It does not help us with the problem we are facing at this point, which is the design of the solution and not the history of the problem." (2696a). Although Dr. Christman was able to foresee that some new administrative units would be more heavily black than others, he testified that he was constrained to make decisions on the basis of factors other than race (2702a). Where there is no history of segregation, race-blind decision-making is not unconstitutional.

The above analysis reveals that based on the evidence presented, the district court's finding of intentional segregation was clearly erroneous. The circuit court's affirmance should be reversed by this Court. Federal Rule of Civil Procedure 52(a) states in part:

> Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.

"Clearly erroneous" was defined in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) wherein the Court stated:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Thus, there may be some evidence that supports the lower court's finding, but if the evidence is so weak as to leave the reviewing court with the belief that the lower court erred, the reviewing court must reverse.

The federal rule also suggests greater deference in cases where credibility of witnesses is involved. Where the credibility of oral testimony is not at issue such deference may not be required.

Nearly all of the evidence cited by the circuit court is objective, non-demeanor evidence. The testimonial evidence

that exists is such that credibility has no significance. Mr. Suley's testimony is classic hearsay and is of no value whatsoever. Dr. Finger's testimony is merely his interpretation of documents that the Court is also free to analyze; his credibility is not at issue. Dr. Christman's testimony is irrelevant because it was not considered during the hearing that addressed the issue of a constitutional violation. The remainder of the evidence is non-testimonial.

Since the credibility of witnesses is not a factor in evaluating the evidence, this Court may review the evidence without the restraint of a clearly erroneous standard. Even if this Court utilizes the clearly erroneous standard, it should reverse the district and circuit court findings. As Justice Rehnquist has said, "objective evidence must be carefully analyzed for it may otherwise reduce the 'discriminatory purpose' requirement to a discriminatory impact test by another name." *Columbus Board of Education,* 443 U.S. 449, 509 (1979) (dissenting).

A review of the evidence cited by the circuit court does not reveal a scintilla of proof that Edgewood School District either participated in any constitutional violation or was an intended beneficiary of another party's illegal discrimination. Mrs. Ryland is from Turtle Creek and has no association with Edgewood. Mr. Suley is not connected in any way with Edgewood, nor did he say that Edgewood was among those groups that pressured the Boards. Dr. Finger's testimony could implicate Edgewood because the district was mentioned in the public documents before the court. But, under that theory any school district mentioned in the documents before the court could be implicated. Clearly, Finger's testimony is not enough, if any, evidence. Edgewood's ability to stand alone under the state standards was approved by the state supreme court. The Braddock Hills brief never mentioned Edgewood and only by inference can one conclude that the brief argued that Churchill avoided merging with Edgewood, a finding that is not a constitutional violation on Edgewood's part. The Harper-Frederick letter provides no evidence of Edgewood actions with respect to GBASD. The 1965 State Board staff report does not mention or

concern Edgewood. The reference to Turtle Creek and East Pittsburgh being a homogeneous unit does not mention or involve Edgewood. The North Braddock stipulation and comment by Early does not mention Edgewood directly and is merely a statement of "North Braddock's" opinion. Finally, in Dr. Christman's testimony he did not state an affirmative plan to isolate Edgewood from Braddock, Rankin or North Braddock.

There being no evidence on the record to include Edgewood as part of a constitutional violation it cannot therefore be included in the remedy of a violation in another district in another part of the state, as will be argued next.

The evidence being so weak as to all participants—petitioners in this lawsuit—the writ should be granted and the lower court's decision should be summarily reversed.

II. The Third Circuit Approval Of Edgewood's Inclusion In The Remedy Without Evidence In The Record That Edgewood Acted With Segregative Intent And Without Evidence That The State Or County Boards Acted With Segregative Purpose In Approving The Independent Edgewood Administrative Unit Conflicts With Supreme Court Precedent.

There is no evidence in the record nor was there a finding that Edgewood committed any constitutional violation. The district court in *Hoots II* found only "that the County and State Boards acted contrary to the Constitution" when they formed GBASD. *Hoots v. Commonwealth of Pennsylvania*, 359 F. Supp. 807, 824 (W.D. Pa. 1973). No finding was made that Edgewood acted in violation of the constitution because Edgewood was not a party to the original suit. The district court concluded that nearby school districts may be included in the remedy without a finding of specific discriminatory actions on their part when "their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts." *Hoots v. Commonwealth of Pennsylvania*, 510 F. Supp. 615, 619 (W.D. Pa. 1981) (Hoots

VI). The circuit court simply misstated the district court's findings when it said that there was a "showing of *de jure* discrimination by *all* of the districts involved." *Hoots v. Commonwealth of Pennsylvania* (A 27) (Hoots IX). The district court considered such a finding unnecessary to the inclusion of other school districts in the remedy, and therefore never made such a finding.

The district court also failed to find that the State or County Boards approved Edgewood as an independent administrative unit for racially discriminatory reasons. The district court concluded that the Boards reacted to pressure from the surrounding communities to shield them from Braddock and Rankin. But, the court failed to identify which communities applied the pressure and which were the beneficiaries of the Boards' reaction. If the court had attempted to identify those communities, it could not have included Edgewood since there is not a shred of evidence on the record that Edgewood pressured the State for its own benefit.

Without evidence of Edgewood's involvement in the constitutional violation either directly or vicariously, the circuit court misapplied standards which this Court has established for remedying impermissible school segregation.

Although the goal of establishing a sufficiently integrated school system is not improper, other school districts can only be included in such a remedy on the basis of their involvement in the constitutional violation. "The scope of the remedy is determined by the nature *and extent* of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974), *citing Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971) (emphasis added). The extent of this constitutional violation cannot reach Edgewood since it had no involvement in the creation of GBSAD. The only "connection" between them is that Edgewood's boundaries were affirmed under the same Act under which GBASD's boundaries were created.

The prerequisite for an interdistrict remedy was set forth in *Milliken:*

> Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts

> caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. *Milliken,* 418 U.S. at 745.

Edgewood cannot be included in the remedy in *Hoots* under this standard. First, Edgewood's borders were separate and autonomous from the neighboring schools and not contiguous to GBASD. Second, Edgewood committed no racially discriminatory acts during the course of Acts 561, 299 and 150, and thus could not have contributed to racial segregation in a district that was not even "adjacent" to it. Third, there is no evidence in the record that Edgewood's district lines were drawn on the basis of race. *Milliken* requires that it be shown either that a district committed a violation or that its *borders were created* as a result of a violation in an adjacent district. Neither has been shown in Edgewood's case.

In *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977) (Dayton I), this Court said that once a violation by a school board has been found, the district court "must determine how much incremental segregative effect these violations had on the racial distribution" of the school district population "as presently constituted when that distribution is compared to what it would have been in the absence of such constitutional violation. The remedy must be designed to redress that difference...." Justice Stewart further interpreted this requirement to mean that "unless a school was affected by the violations, it should not be included in the remedy." *Columbus Board of Education v. Penick,* 443 U.S. 449, 479 (1979) (concurring).

Although *Dayton* and *Columbus* involved intradistrict remedies, the remedial power as defined in those cases is relevant to *Hoots.* They set a standard against which the extent of district court remedial authority can be measured. The district court found a constitutional violation in *Hoots* on the part of the State and County Boards. At this point the district court, under the reasoning of *Dayton I* and *Columbus,* should have determined the "incremental effect" that the creation of GBASD had on the population of the neighboring school districts. If it could have been shown that the population of any

surrounding district would have been different absent the violation by the State, then that district could be included in the remedy. No such finding was made by the district court and could not have been in Edgewood's case because, again, there has been no showing that Edgewood "was affected by the violations." Therefore, Edgewood should not have been included in the remedy.

The argument for Edgewood's exclusion draws additional support from Justice Powell's opinion in *Austin Independent School District v. United States*, 429 U.S. 990, 995 (1976) wherein he stated:

> large scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past.

Although the evidence in *Hoots* might tend to show that some of the districts that had once been proposed as merger partners with Rankin, Braddock and North Braddock would have been included absent a constitutional violation, there is no evidence that Edgewood would have been so considered by the State. Therefore, if the State and County Boards had fulfilled their constitutional duties, Edgewood would not have been part of an administrative unit including Rankin, Braddock or North Braddock.

If this Court permits Edgewood's inclusion in the *Hoots* remedy to stand, the remedial power of district courts will have been enormously expanded. A district court will have the power to include a separate and autonomous school district in an interdistrict remedy without a showing that the district committed or benefitted from a constitutional violation, without a showing that the State committed a violation with the intention or result of benefitting the district, without a showing that absent the constitutional violation the district would not be composed as it is, and without a showing that the incremental effect of the constitutional violation touched the district. Such

an expansion of district court authority is unnecessary in this case for there to be an effective remedy. There are other school districts that border on GBASD, each possessing the financial base and white student population to create an effective remedy. Edgewood's small student population does not contribute significantly to the current remedy.[2]

This Court should grant the writ of certiorari in this case to correct the errors of law of the lower courts.

III. Since The *Milliken* Decision, The Showing Of Proof Required For An Acceptable Interdistrict Remedy Has Varied Among The Circuit Courts Of Appeals. This Court Should Demand A Showing Of Evidence That A School District Either Contributed To Illegal Segregation Or Was The District Beneficiary Of Purposeful Discrimination For That District To Be Included In An Interdistrict Remedy.

The third circuit in *Hoots IX* approved an interdistrict remedy without proof that the districts included in the remedy committed a constitutional violation or that these districts were intended to be the beneficiaries of the State or County Boards' purposeful segregation. The standard utilized by the district court and affirmed by the circuit court was:

> A multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts.[3] *Hoots VI*, 510 F. Supp. at 619.

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[2]Edgewood has 731 students out of the 9,132 included in the remedy (A 35).

[3]In its quotation of the district court's standard, the circuit court omitted the phrase "that have not been found to have committed a constitutional violation themselves" (A 28). It is assumed that the court did not intend to alter the district court's standard. In any event, the district court did not find the school districts guilty of a constitutional violation. The third circuit's statement that *all* of the districts did commit a violation is in error and must be dismissed.

The district court cited *Morrilton School District No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979), *cert. denied* 444 U.S. 1070 (1980) in support of this standard. *Morrilton* does in some respects support the *Hoots* standard for interdistrict remedy. In that case there was a finding that the State caused unlawful segregation in one district and the court held that in spite of the purported innocence of the outlying districts they could be included in an interdistrict remedy.

There are, however, dispositive differences between *Morrilton* and *Hoots*. In *Morrilton*, state law had required, until *Brown v. Board of Education*, 347 U.S. 483 (1954), that races be educated separately, Thus,

> [T]he geographical arrangement of Conway County districts resemble[d] a crazy quilt, and the resemblance results from the gerrymandering of district lines in years past in deference to the requirement of segregation, there can be no other explanation for it. *Morrilton*, 606 F.2d at 226.

The circuit court found in *Morrilton* that the boundary lines of each district involved in the remedy were a direct result of purposeful segregation. In *Hoots* there was no proof that the boundary lines of any of the districts involved in the remedy were a result of the State's impermissible formation of GBASD. There was also no evidence of a "crazy quilt" pattern of district lines that were a product of a history of intentional segregation.

Another circuit decision that could be read as supporting the Hoots standard is *United States v. State of Missouri*, 515 F.2d 1365 (8th Cir. 1975). In that case two white districts were joined with a black district for integration purposes after a violation by the state had been found. One of the white districts argued against its inclusion in the remedy for much the same reasons as Edgewood seeks its own exclusion: (1) it did not participate in any way as a separate school district in action leading to the establishment of Kurloch (the black district) as a segregated district; (2) the complaint did not allege that Ferguson's (the white district) boundaries were established for racial reasons; (3) there was no finding to that effect; and (4) the only

acts chargeable to Ferguson are chargeable vicariously from actions attributable to the State of Missouri directly or through its State Board of Education. *Id.* at 1369. The court rejected this district's arguments because of the district court's finding that the white district had previously avoided any proposals for integration with the black district for reasons of race.

There are at least two circuit courts that have applied a different standard for including school districts in an interdistrict remedy and that would have likely decided the *Hoots* remedy differently. In *Lee v. Lee County Board of Ed.*, 639 F.2d 1243 (5th Cir. 1981), the court denied the government's motion for interdistrict relief to integrate a black district with neighboring districts in spite of the historical background of mandatory segregation in the county. The court stated that

> an interstate remedy may be justified...when there is proof of unconstitutional governmental action that has been a "substantial cause" of a "significant" interdistrict segregative effect, and where an interdistrict desegregation plan is necessary in order to remedy segregation "directly" caused by this constitutionally impermissible conduct. *Id.* at 1256 (quotes refer to *Milliken*).

The court interpreted *Milliken* to require "clear proof of cause and effect and a careful delineation of the extent of the effect. In the absence of such a showing, school district lines are to be carefully observed and desegregation remedies confined to orders affecting the school district in which the condition of segregation is manifest." *Id.* A long-standing independent school district, such as Edgewood, could never be included in an interdistrict remedy under the above standard without far more evidence of "cause and effect" than exists in the *Hoots* case.

The Sixth Circuit of Appeals, in approving an interdistrict remedy, reasoned in a fashion that shows it would have likely reached a different conclusion in *Hoots*. In *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied* 421 U.S. 931, the court found that neither the school system for the City of Louisville

nor the surrounding county school system "were operating dual school systems from which all vestiges of state-imposed segregation had been eliminated, as required by law." As a result, the court determined that State created school district lines could be disregarded. The court found several important distinctions between the case before it and the facts in *Milliken*. Many of the *Milliken* distinctions may be found in the surrounding districts (especially Edgewood) in *Hoots*. The court noted:

—In *Milliken* there was no evidence that the outlying school districts had committed acts of de jure segregation or that they were operating dual school systems.

There is also no such evidence in Hoots.

—In Kentucky the County was the basic educational unit of the state. Statutes of this sort did not exist in Michigan.

In Pennsylvania the basic educational unit was traditionally coterminous with a municipality, not a county or larger governmental unit. 24 Pa. Stat. Ann. §2-201 (Purdons).

—"A crucial difference between the present case and *Milliken* is that school district lines in Kentucky have been ignored in the past for the purpose of aiding and implementing continued segregation." *Id.* at 1360.

This has not occurred in Pennsylvania.

The court decided that an interdistrict remedy could be imposed in *Newburg*, but it probably would not have done so in *Hoots* because the involvement in the violation by the surrounding districts in *Hoots* is much like the actions of the suburbs in *Milliken*. This argument is buttressed by the sixth circuit's decision in *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976).

In *Cunningham* the court refused to include an almost all-white school in an interdistrict remedy. Although the court ignored the Louisville district lines in *Newburg*, it was unwilling to alter the Anchorage Independent School District lines for

purposes of further integrating the county. The court found that no student had ever been excluded from the Anchorage School because of race. The court also found that there was no evidence that the Anchorage boundaries were drawn to include whites and exclude blacks. Therefore, the court concluded that "without evidence of a 'constitutional violation within [Anchorage] that produces a significant segregative effect in another district' [citing *Milliken*, 418 U.S. at 745)]," Anchorage cannot be included in an interdistrict remedy. *Id.* at 544.

It is clear after review of these cases that there is not a unified interpretation by the circuit courts of the appropriate finding for fashioning an interdistrict remedy. Under the *Hoots* standard, in any case in which the state is found guilty of drawing a certain school district's boundaries on a racial basis, any nearby district can be included in the remedy if its boundaries were drawn or redrawn at the same time as the illegal boundaries of another district. Of course, in *Hoots* that means that any school district in the state could be included in the remedy. The fifth and sixth circuits would have required a much clearer showing of either a violation by each of the districts surrounding GBASD or a clear effect on each of the surrounding districts because of the formation of GBASD. Because of the confusion among the circuits as to the correct standard to apply in cases of interdistrict violations such as exists in *Hoots*, this Court should grant the writ so as to harmonize the approaches of the circuit courts.

CONCLUSION

This Court should grant the writ of certiorari requested by the Petitioner to halt the unbridled growth of district court power both to find illegal segregation without any evidence of invidious intent to segregate and to include a school district in a remedial order when that district was not involved in a constitutional violation.

RESPECTFULLY SUBMITTED, this 1st day of June, 1982.

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